Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HOWARD R. MONTGOMERY, for himself, and derivatively, for the Aetna Plywood, Inc. Profit Sharing Plan, as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan, Nominal Defendant, and as certified representative of the class of participants in the Aetna Plywood, Inc., Employee Stock Ownership Plan during July 1992,

Petitioner,

v.

AETNA PLYWOOD, INCORPORATED, a Delaware corporation, JEFFREY DAVIS, Lawrence Rassin, Keith Weller, Jon Minnaert and Scott Haldin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Delaware corporation law's *Revlon* doctrine (that a corporate board's decision to sell the company or effect a change-of-control transaction triggers a heightened duty to maximize value for all shareholders) is part of ERISA's "appropriate equitable relief" assertable by an ESOP class against an attempt to dilute its equity interest by a bargain sale of control to a third party for a mere token consideration.

Whether ERISA recognizes the "equitable standing" doctrine, such that a previously sold-out ESOP class whose equity is being restored in litigation, may assert the *Revlon* doctrine against a transaction that is being affected during the period when the ESOP's legal title to shares was interrupted by the prohibited transaction at issue in the litigation. (That is, after its shares were sold in a prohibited transaction but before they were restored by the litigation over the transaction).

Whether, in an ERISA case in which a court has reserved jurisdiction to enforce the terms of a settlement, the court abuses its discretion in simply refusing to rule on a party's motions to contest defendants' actions which violate the settlement's terms.

In an ERISA case in which, after trial, the court had determined that the ESOP's 95% ownership of the employer was redeemed for less than fair value, and the claims have been settled for cash plus restoration of an equity ownership of the company, plus the right to challenge the fairness of any change-in-control transaction, whether the court errs or abuses its discretion in either (a) simply declining to hear the class' challenge to the company's dilution of the restored

equity by selling 51% control to a competing management group for a mere token amount, or (b) declaring that the class lacks standing to assert the protections of Delaware's *Revlon* fiduciary duty to maximize value for shareholders on a change of control transaction, when the transaction occurred after the class' ESOP shares were wrongfully redeemed, but before the wrongfully sold equity was restored.

RULE 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Howard R. Montgomery, for himself, and as certified representative for the participants in the Aetna Plywood, Inc., Employee Stock Ownership Plan

Defendants: Aetna Plywood, Inc. and Jeffrey Davis

Third party interveners: Lawrence Rassin, Keith Weller, Jon Minnaert and Scott Halden.

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Howard R. Montgomery, for himself and as the certified representative of the class of June 1992 ESOP participants ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO THE OPINIONS AND RULINGS BELOW

The opinion of the court of appeals is published as *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000). (App. A). The district court's denial of the plaintiff/ class representative's motion to block the company's "reorganization" by selling control to the management group is unreported. (App. B at 30a).

BASIS FOR JURISDICTION IN THIS COURT

The decision sought to be reviewed was entered October 26, 2000. Rehearing and Rehearing en banc, was denied on December 6, 2000. On March 2, 2001, Petitioner filed a request to extend the time to file the petition for a writ of certiorari. On March 6, 2001, Justice Stevens extended the time to April 5, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2):

> (a) A civil action may be brought . . .
>
> > (2) . . . by a participant . . . for appropriate relief under Section 1109 of this title

ERISA § 409, 29 U.S.C. § 1109(a), provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Aetna Plywood Inc., a Delaware corporation, a Chicago-based distributor of wood products, was founded by the Davis and Schwanke families in 1937. An Employee Stock Ownership Plan was created in 1978. Over the years, shareholders who retired, died or otherwise left the company, generally sold their shares to the ESOP. As of June 12, 1992, the company's outstanding shares were owned 95% by the ESOP, and 5% by Jeffrey Davis, grandson of one of the founders. Davis, who was president, CEO and chairman of the ESOP committee, caused the ESOP to sell its 95% ownership block back to the company, making him a 100% owner.

In 1995, Plaintiff, Howard R. Montgomery, a participant in the Aetna Plywood Inc. Employee Stock Ownership Plan, an ERISA retirement plan, filed this action under the Employee Retirement Income Security Act of 1974, asserting that the $85.75 per share price received by the ESOP was far less than fair market value; i.e., for inadequate consideration, rendering the sale a prohibited transaction under ERISA, for which the defendant corporation and directors would be liable for the shortfall. On April 16, 1996, the district court granted class certification. *Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347 (April 16, 1996 memorandum opinion and order, and July 2, 1996 Opinion on reconsideration). (App. J) Subsequently, the district court granted leave to amend the complaint to add a breach of fiduciary duty claim under Delaware corporate law. *Montgomery v. Aetna Plywood, Inc.*, 956 F. Supp. 781 (N.D. Ill. E.D. Jan. 2, 1997). (App. I at 151a).

During three years of active litigation, the plaintiff and the class not only had to battle with the defendants, who had effected the bargain sale of the employees' stock ownership. They were also challenged repeatedly by a group of three branch managers (Messrs. Rassin, Weller and Minnaert), who were secretly funded and directed by the defendants to oppose the plaintiff and the class by alleging that they represented the class' interests and that the transaction had been at a fair price. (*See e.g.*, App. J at 162a). Plaintiffs suspected, but discovered only later that this third-front group was actually a shill, financed and directed by the defendants and their counsel.

Following a bench trial, the United States District Court made findings and entered judgment in favor of the participant class, held that the $85.75 per share price paid

for the ESOP's 79,876 shares had been $70 per share less than fair market value, resulting in damages totalling $5,072,114.60 for the 72,458.78 shares owned by class members (reduced for the shares owned by defendants), plus post-judgment interest of $2,645,411.95, bringing the total damages to $7,717,526.55, as of December 31, 1997. *Montgomery v Aetna Plywood*, 39 F. Supp. 2d 915, 933-934 (N.D. Ill. E.D., July 16,1998). (App. H).

Thereafter, the parties entered into negotiations and reached a settlement of the claims for some $6.1 million cash, a previous partial settlement with the independent directors had produced an additional $800,000 for the 100-member class (App. L at 189a), plus restoration of 20% of the company's shares (*Id.* at 190a), plus an additional portion of the proceeds of a sale of the company within three years (*Id.* at 192a), plus the severance of Mr. Davis' connections to the company (*Id.* at 190a), and assignment of his shares to the class (*Id.* at 191a), plus the maintenance of the court's jurisdiction (*Id.* at 193a), and right of the class to contest the fairness of any "change of control transaction" by the company. (*Id.* ¶ 14 at 191a).

At the same time as the settlement was being presented to the district court for its approval, Davis had separately determined to have the company engage in a "reorganization" by issuing new shares, creating a new 80% interest, of which 29% went to Davis' counsel, and the remaining 51% control was issued for a token $4000 to the Rassin group (eventually adding a fourth member, one Scott Halden) that had shilled for the defendants and affirmatively fought the class repeatedly throughout the litigation, secretly financed and directed by the defendants Aetna, Davis and their counsel.

In accordance with the class' rights under the settlement agreement, class counsel objected to the "reorganization", insofar as it gave 51%-control to the friendly management group over class counsel's demand that other potential bidders be given an opportunity to buy or invest in the company at a fair value. And there were interested bonafide, capable bidders, recognized to have the wherewithal to buy or invest in the company for real value. One (the "Pacific Group") actually offered $7 million, subject to possible increase; another (the "McKillican group") indicated its desire to buy and its willingness to proceed ahead to negotiate an acquisition. A third group ("DN Partners") also initiated its evaluation for investment or acquisition.

Nonetheless, the management group simply rejected all such efforts and refused to deal with any other buyer than themselves and Davis' counsel indicated the company's determination to proceed with the "reorganization" unchanged.

Over class counsel's assertion that the *Revlon* doctrine required the directors to open the process for all bidders, to maximize value for the shareholders (who equitably were only the class, at this point), the district court refused to block the sale of control, misunderstanding that the shares issued by the company were Davis' to do with as he pleased, and advising class counsel: "I'm not your chancellor for life." (App. B at 26a).

On appeal, the seventh circuit acknowledged that the district court's reasoning had been faulty (since Davis' shares were being abandoned to the Class, the issue was whether the corporation could sell control to the Rassin group over the class' objections) but did not reach the merits of the

change in control dispute, then held that the ESOP class may have had standing under the Agreement and ERISA, but lacked derivative standing under Delaware corporate law to challenge it, because the wrong alleged — the agreement to sell 51% control for a mere pittance — had occurred during the period after the defendants had wrongfully redeemed the ESOP's shares, but before the class' equity ownership had been restored. (App. A at 8a-11a).

REASONS FOR GRANTING THE WRIT

I. The Court should declare that ERISA incorporate Delaware's *Revlon* doctrine.

The court should exercise this opportunity to flesh out its declarations in *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238 (2000), that ERISA incorporates trust law fiduciary duties, and entitles participants to "appropriate equitable relief" against fiduciaries and others, by adopting the *Revlon* doctrine, perhaps all the core Delaware corporate protections, as part of the federal courts' role "to develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989).

This case presents a factual situation in which an ESOP class, first forced to pursue the litigation to the very end, in which it actually proved that it had been denied adequate consideration when its 95% ownership block was sold out from under them at less than fair consideration, was subsequently being defrauded by the same complicit group which was simultaneously diluting the equity interest being restored to the class by a settlement of the case. In such circumstances, the *Revlon* doctrine, *Revlon, Inc. v.*

MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. Supr. 1986) — that a corporate board which has decided to sell the company may not choose a favored buyer, but must instead fulfill a bedrock fiduciary duty to achieve the best possible price or transaction for all the shareholders — is widely recognized, cited and followed, without dissent. This obligation is triggered whenever the board has decided to engage in a change-of-control transaction. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. Supr. 1994).

Whether viewed as a bargain sale of 80% shares to a favored management group in violation of its duty to maximize value for the corporation and its shareholders under *Revlon*[1] and its progeny[2], or as corporate waste from the

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1. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) ("*Revlon*"), invalidated a lockup adopted to favor management group over outside hostile bidder for control of company. It held that once the board of directors has decided to sell the company or otherwise engage in a "change of control" transaction, the Board's fiduciary duty changes from preservation of the corporate entity to maximization of the company's value at a sale for the stockholders' benefits. The decision to sell the company triggers a heightened duty to the shareholders which the directors "cannot fulfill . . . by playing favorites with the contending factions." *Revlon* at 184.

2. *See QVC Network, Inc. v. Paramount Communications Inc.*, 635 A.2d 1245, 1264 (Del. Ch. 1993) (proposed change in corporate control triggered heightened duty on target company's board to obtain reliable information about competing offers before business judgment rule could apply; adoption of antitakeover provisions invalidated as breach of fiduciary duty); *aff'd sub nom. Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d

(Cont'd)

issuance of shares for no meaningful consideration[3], the

(Cont'd)

34, 48 (Del. 1994) (describing directors' duties when a corporation undertakes a transaction that will cause either a change in corporate control or a breakup of the corporate entity. Board has four obligations: (a) to be diligent and vigilant in examining the proposed transaction and competing offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the competing offers or an alternative course of action which would provide the best value reasonably available to stockholders; and (d) to negotiate actively and in good faith with the various competing acquirers).

Compare Mills Acquisition Co. v. MacMillan, Inc., CCH Fed. Sec. L. Rptr. ¶ 94,071, 1988 WL 108332 (Del. Ch. 1988) (invalidating antitakeover poison pill provision, discussing "the . . . Board's bedrock fiduciary duty under Revlon, to achieve, in a sale of the company, the best possible price or transaction for the shareholders."), *with Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990) (Board's decision to merge with another corporation was not a decision to put the corporation up for sale and did not trigger *Revlon* duty to either auction corporation or maximize short term shareholder value, absent any substantial evidence to conclude that board had made dissolution, sale or breakup of corporate entity inevitable).

3. *Sanders v. Wang*, 1999 WL 1044880 at *9-10 (Del. Ch. 1999), upheld a complaint against board for gross negligence, waste of corporate assets and breach of fiduciary duty for purporting to exercise discretionary plan administration powers in issuing shares to management group that exceeded explicit limitation on the total number of authorized shares under plan. The court described that an action for corporate waste must show that corporation received no consideration for the transferred asset: "The standard is stringent and requires that no person of ordinary business judgment would conclude that the deal was fair to the corporation."

(Cont'd)

issuance of the 51% control of a $10 million corporation to the Rassin group for a token $4000 constituted an indefensible breach of fiduciary duty,[4] no less bad faith than Davis' manipulative buyout of the class' 95% block that generated the litigation in the first place.

The court's treatment of the company's issuance of the dilutive shares, as if they were Mr. Davis' shares to transfer to whomever he wished, April 22, 1999 transcript at 2.[5] (App. D at 37a) was clearly wrong, because

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(Cont'd)

Thus, the issuance of stock to corporate officers for clearly inadequate value could be viewed as corporate waste or unjust enrichment — both breaches of fiduciary duty for which the appropriate remedies of disgorgement or constructive trust and return of shares to the corporation are available.

4. There was certainly no attempt to assert that the $4000 corresponded to any good faith bona fide value of the interest sold. Indeed, in their filings, Defendants essentially acknowledged that it was a token price and disavowed any obligation to ascertain fair market value for the interest. (R. 395 at 3-5). The Delaware Supreme Court's recent decision over the widely publicized $100 million severance package Disney President Eisner granted to his friend Michael Ovitz after a mere year as president, affirmed the dismissal of the original complaint, but granted the derivative plaintiffs the opportunity to rephrase their complaint with particularized facts creating a reasonable doubt that the board's decision was protected by the business judgment rule. *Brehm*, 746 A.2d at 267.

5. The Court:

> All right, there is a petition called petition for instruction. I am not sure of the format of it, but in any event, it has to do with the disposition of Mr. Davis' shares which were not part of the original settlement of

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(Cont'd)

the case. The proposal is to distribute, reissue the stock in a format that would result in the distribution of Mr. Davis's shares, some to the plaintiffs, some to an inside group, 51 percent as I understand it, and 29 percent to Mr. Collins and Mr. [Levin].

The result here as I see it is it's Mr. Davis's stock if he wants to distribute it. It was never part of the settlement that he had to surrender his stock ownership. The original judgment that I entered in this case was with respect to recovery of money. The parties then entered into settlement proposals and discussions and decided that there would be a settlement and an escrow arrangement.

Money was then produced to pay the liability claim which was somewhat reduced from what the amount would have produced in the event of a final judgment against the defendants.

That settlement was approved by the Court. Now, because of the jurisdiction of the Court over the company and the parties, approval was sought with respect to distribution of Mr. Davis' shares. Comments have been filed by the parties.

I am going to authorize the preparation of an order approving the transfer of stock as proposed by these parties who would receive the stock and with the conditions imposed that the plaintiffs' group would receive 20 percent of the stock as well.

You may draw an order to that effect.

(Tr. of April 29, 1999 Hr'g before Hon. Judge William T. Hart, at 2-3).

the settlement agreement required Davis to abandon his shares to the corporation. And while the court may well have tired of this battle by that time[6], the court still had jurisdiction and the class' interests were being violated by the defendants (then-sole Director Davis and the Company who were still fiduciaries to the class) and the Rassin group. Accordingly, the court could and should have protected them against being sold down the river by the defendants a second time.

II. The Court should also grant the writ to declare that ERISA also recognizes equitable standing, where appropriate, to remedy breaches that occur while a sold-out ESOP group lacks legal title to their shares because of the prohibited transaction at issue in the litigation

Parties who confer standing by contract should be equitably estopped from later challenging it[7]. Having

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6. *See* June 2, 1999 transcript at 2 (App. B at 26a):

> The court: "The case is over. I am not your chancellor for life here."

7. The panel's decision below goes off on the contract's lack of a specific provision referencing 8 Del. Code § 327. (App. A at 8a). But, if the class already had standing under the Code provision, then the contract language was unneeded surplusage. And if the defendants contracted that the class just had the right to pose the objection, then the statutory standing is unnecessary. The contract was simply drafted in the way it was, precisely to eliminate any discussion over whether the class had the right to challenge a bargain dilution sale to a favorable party who opposed the class. Invoking a separate requirement that the contract explicitly reference the Code section was unnecessary.

(Cont'd)

contracted to the class the right to assert these claims, the Aetna defendants should have been equitably estopped from denying the class' standing to challenge the bargain sale of control. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 586 (7th Cir. 2000), (applying equitable estoppel against an employer's denial of coverage), all by itself, or by ERISA's adoption of the implied covenant of Good Faith and Fair Dealing, which is imposed in all Delaware Contracts. *See Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 393, 2000 WL 121135, slip op. at 2-3.

The decisions below stand as broad exceptions to this court's rulings that ERISA standing is to be broadly construed and that a District Court's duty to exercise its jurisdiction may be abdicated "only in the exceptional circumstances where . . . [deferral or abstention] would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-815 (1976). (Colorado River's own abstention rule would not apply here in any event).

The quasi-abstention and standing barriers erected by the courts below also conflict with ERISA's basic purposes and this court's direction that ERISA standing is to be broadly interpreted and jurisdiction may be declined in very limited circumstances.

(Cont'd)

Moreover, the Seventh Circuit's ruling frustrates the intentions of settling parties, and encourages those who agree to contracted obligations to just ignore them, because the court will entertain additional defenses asserted by those who wish to evade their agreed-to obligations under a settlement. Similarly, it sends the message that people who settle cannot rely upon the court to enforce settlement agreements according to their terms. Such a policy also conflicts with the federal courts encouragement of resolution by settlement.

The court should also make it clear that the standing to assert this claim in an ERISA context should be determined to broadly effectuate its purpose of protecting beneficiaries' interests:

> It is intended that coverage . . . be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs.

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4854 and 1 ERISA Leg. History 604.

In the context of ERISA litigation over the bargain purchase of the ESOP's 95% equity stake as a prohibited transaction at an unfavorable rate, for inadequate consideration, where the class' settlement agreement is being duplicitously diluted by a secret side reward to three class members who repeatedly shilled for the defendants against the class' interests, ERISA's purpose of protecting employees generally affords standing on a liberal basis, where needed for workers' protection. Case law amply supports a liberal, not hyper technical, construction of standing, in order to ensure that workers' retirement rights are protected. *See Kingsbridge Capital Group v. Dunkin' Donuts, Inc.*, 1989 WL 89449 (Del. Ch. 1989); *see also Lehmann v. Brown*, 230 F.3d 916 (7th Cir. 2000); *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 957 (5th Cir. 1995); *Sommers Drug Stores Co. Employee Profit Sharing Trust*, 883 F.2d 345 (5th Cir. 1989); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1251 (6th Cir. 1992); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998) ("employee" may include prospective

employees); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1994); *Yarde v. Pan American Life Ins. Co.*, 67 F.3d 298 (4th Cir. 1995).

Delaware's equitable standing doctrine is peculiarly appropriate for a plan whose shares have been sold out from it in a prohibited transaction and needs protection from being diluted out of its bargained-for restored equity.

The decision of the court below — that a class with standing[8] under contract and ERISA should nonetheless be

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8. Of the three types of standing, the class satisfied all three. The first, an Article III hurdle of injury in fact, that is fairly traceable to the defendants, and is redressable by a favorable judicial ruling, as described by *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) — requiring that the plaintiff have "a personal stake in the outcome of the controversy . . . as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" — was not disputed.

The second, a "prudential" standing requirement — that the plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit — was also clearly met. The class was the ESOP shareholder group whose 95% ownership block, the district court found, had been involuntarily redeemed by the Aetna defendants at some $7 million less than adequate consideration, and who were in the process of settling those claims with the Company by cash, plus a restored equity ownership in the company. As such, they were already in litigation over the manner in which their shares had been lost, by a breach of fiduciary duty, when the defendants breached their fiduciary duties by duplicitously diluting the interest being restored to the class. (App. H).

(Cont'd)

denied standing at all to challenge the bargain dilution of their to-be-issued shares by the simultaneous bargain sale to a complicit management group — poses a real threat to the protection of an ESOP class. This court should declare that, once Article III standing exists, ERISA affords standing, without additional hurdles, where standing to raise the particular claims exists from either explicit contractual terms[9], or equity.

(Cont'd)

It is the third type of standing — the procedural prerequisites to a party's bringing the particular type of claim — that appears as the panel's basis for denying standing herein (App. A at 24a), that is that the ESOP class — who the district court found had been unfairly redeemed out of its interest in the transaction being challenged from the beginning was somehow now to be required to surmount a newly erected hurdle in order to proceed, and had entered into a settlement agreement obligating the Company to restore a 20% common stock stake (App. L at 190a) — was still not then technically a shareholder who could complain about the company's simultaneously adopted "reorganization" plan to reorganize by selling 51% control for a mere $4,000, never asserted to be a fair value for the stake. (App. A at 6a).

The panel's technical denial of standing, on the ground that the class was not technically a shareholder at the time that the reorganization was approved by the company, although not effected until the Class' shares had been restored, ignored the settlement contract's explicit grant to the class of the right to have the fairness of any such change of control transaction decided by the court, and the ERISA purpose to protect participants, and the Delaware Corporate law's equitable standing concepts, all of which support the class' standing to block the obviously unfair sale of 51% control to a favored group of managers for a mere $4,000.

9. As the panel acknowledged, the contract explicitly grants the Class standing to raise this issue and have it addressed by the court. (App. A at 10a).

Moreover, Delaware's equitable standing rule would appropriately empower ERISA plan participants to protect themselves from the dilutive bargain sale of control here. In *Shaev v. Wyly*, 1998 WL 13858 (Del. Ch. Jan. 6, 1998), a shareholder of a top-tier parent brought a derivative action to challenge the spin-off subsidiary's grant of excessive options to its officers and directors. Similar to the situation here, the defendants moved for summary judgment that the plaintiff lacked standing because he had not brought his action originally as a double derivative action, did not become a direct shareholder of the spin-off company until after the option grant, and was not a shareholder of the subsidiary after the spin-off was complete. But, regardless of the three strikes against the plaintiff, the Delaware Chancery Court followed clear Delaware precedent that rejects the strict application of technical legal standing rules that would insulate the wrongdoers from suit. Citing *Helfand v. Gambee*, 136 A.2d 558 (Del. Ch. 1957), Vice Chancellor Steele held that the aim of the statutory provision "would not be served by denying plaintiff standing to sue. . . . To the Contrary, to deny standing on these facts would insulate defendants from potential liability for their alleged misdeeds. . . .

> Plaintiff, as a Software shareholder, had the right to bring a double derivative action on behalf of Commerce for a period of months. Why he did not do so is unclear. I decide only that Software's decision to divest itself of its entire interest in Commerce cannot, as a matter of law, deprive plaintiff of standing to bring a derivative action on behalf of Commerce, even where the challenged actions occurred before plaintiff owned shares in Commerce.

1998 WL 13858 at *4-5.

On reconsideration, Vice Chancellor Steele reaffirmed his position:

> Here, plaintiff lost his chance to file a double derivative action because, after the spin-off, Software and Commerce were no longer in a parent/subsidiary relationship. Were this Court to apply section 327 strictly, plaintiff would also be barred from filing a derivative action. Under those circumstances, I refuse, as I believe one charged with the duty to apply equitable principles must, to adhere blindly to a technical legal rule and to allow thereby an alleged corporate wrongdoer to thumb his nose at the possibility of redress. Thus, I found that plaintiff has equitable standing to bring a derivative action on Commerce's behalf, notwithstanding the fact that the challenged actions occurred before he owned any Commerce shares. I reconsidered my finding in light of the defendants' repeated arguments and reexamined my role as a member of a court charged to see that equity be done, and I decline to alter my conclusion on this issue.

Shaev v. Wyly, 1998 WL 118200 (Del. Ch. March 6, 1998) (denying defendants' motion for reargument).[10] The equities of this case were much more compelling. Here, the reorganization's bargain sale of control to the three branch

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10. On the defendants' interlocutory appeal of the ruling, 1998 WL 155540 (March 26, 1998), the Delaware Supreme Court heard briefs and arguments on the issue, and "affirmed on the basis of and for the reasons assigned by the Court of Chancery in its letter opinions . . . dated January 6, 1998, and March 6, 1998." *Wyly v. Shaev*, 719 A.2d 490 (Del. Supr. October 1, 1998).

managers who had shilled themselves for the Aetna/Davis defendants stands as quite squarely Mr. Davis' duplicitous device to thwart the redress achieved in the case for the class, no less than the original 1992 transaction. Similar to Mr. Davis' buyout of the ESOP's 95% shares at less than half of fair value, his giveaway sale of control to the branch managers intentionally diluted the ESOP class' shares in clear violation of any reasonable conception of good faith and fair dealing.

CONCLUSION

Wherefore, petitioner requests that this court grant him and the class a writ of certiorari to review the decisions of the courts below, reverse, and find that the class has appropriate standing to challenge the bargain sale of the 51% control block to the Rassin group, invalidate the "reorganization" of Aetna Plywood, Inc. by cancelling the control shares issued to the Rassin group, declaring them held in a constructive trust for the company or otherwise invalidating their bargain sale.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED OCTOBER 26, 2000

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 99-2364, 99-2707 and 00-1033

HOWARD R. MONTGOMERY, for himself and for all others similarly situated; for themselves and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan,

Plaintiffs-Appellants,

v.

AETNA PLYWOOD, INCORPORATED, et al.,

Defendants-Appellees.

CLINTON A. KRISLOV and KRISLOV & ASSOCIATES, LTD.,

Plaintiffs-Appellants,

v.

AETNA PLYWOOD, INCORPORATED, et al.,

Defendants-Appellees.

Argued Sept. 11, 2000
Decided Oct. 26, 2000

* * *

Appendix A

Before BAUER, EVANS, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

This appeal arises out of a class action suit brought by Howard Montgomery on behalf of participants in Aetna Plywood's Employee Stock Ownership Plan ("ESOP") against Aetna Plywood and its directors, based on an allegation that Aetna Plywood had not adequately compensated the ESOP participants when the directors caused the ESOP to sell its shares back to the company. Eventually, the parties reached a pair of settlements. This appeal, however, does not involve, directly at least, the settlements or the underlying class action suit. Rather, it involves three ancillary matters the district court decided: the legality of an ownership restructuring plan Aetna Plywood proposed, the amount of the settlement fund that should be awarded to class counsel and the lead plaintiff, and the proper disposition of a subsequent state law action brought by class counsel to enforce a term in one of the parties' settlement agreements. With one minor exception, we affirm the district court's decisions on each of these matters.

I

Just before Aetna Plywood purchased the stock owned by its ESOP, the ESOP owned 95% of the company's outstanding shares. The remaining 5% was owned by Jeff Davis, who served as Aetna Plywood's chief executive officer, the chairman of its board of directors, and a member of the committee that managed its ESOP. Sometime in mid-

1992, Davis, along with the other three individuals who served on both Aetna Plywood's board of directors and its ESOP committee, caused the ESOP to sell its shares of Aetna Plywood stock to the company. This transaction left Davis as the sole stockholder in Aetna Plywood.

Believing that Davis and Aetna Plywood's other directors had caused the ESOP to sell its shares of Aetna Plywood stock for too low a price, Howard Montgomery, a former Aetna Plywood employee and ESOP participant, filed, in May 1995, a class action suit on behalf of ESOP participants against Aetna Plywood and the directors who had approved the stock sale ("the Montgomery defendants"). The class complaint alleged that, by causing the ESOP to sell its shares at a below-market-value price, Aetna Plywood's directors had breached fiduciary duties placed on them by ERISA and Delaware corporate law.

The case eventually went to trial before the district court in June 1998. On the third day of the trial, two directors, both of whom were outside directors, entered into a settlement with the class. They agreed to pay the class $800,000 in exchange for a release from liability. At the conclusion of the trial, the district court found Aetna Plywood, Davis, and the other remaining defendant-director, John Francione ("the trial defendants"), liable for causing the ESOP to sell its interest in Aetna Plywood without ensuring that the ESOP received adequate consideration. The district court further found that the defendants had undervalued the ESOP's stock by $70 a share. After making adjustments for the settlement with the outside directors and prejudgment interest, the court arrived at a damages figure of $7,243,820.17.

Appendix A

Following the district court's decision, the trial defendants initiated negotiations with the class, fearing that the judgment entered against them would bankrupt Aetna Plywood. These negotiations proved fruitful and the parties reached a comprehensive settlement agreement. The trial defendants agreed that Aetna Plywood would pay the class $6.1 million cash, give the class 20% of the company's stock, and, if Aetna Plywood were to be sold within three years, turn over to the class 25% of the sale proceeds in excess of $6.1 million. Davis promised to relinquish his Aetna Plywood stock and to give up all control of and involvement in the company. He also agreed to relinquish his ownership interest in the company's headquarters, to forfeit any monies realized from the sale of his shares, and to forego any future remuneration from the company. Moreover, both Davis and Francione agreed to give up any recovery they might be entitled to as ESOP participants.

In exchange for these promises, the class agreed to release all claims asserted and assertable against the trial defendants and promised not to seek further assets from Davis. In addition, class counsel agreed to limit any attorneys' fee request to one-third of the settlement recovery plus reimbursements of costs and expenses not exceeding $500,000, and the defendants promised not to oppose a request within those bounds. The parties also agreed that Aetna Plywood would consult with class counsel regarding any sale or change of control transaction involving the company and that Aetna Plywood could submit any proposal in this regard, to which class counsel objected, to the court for approval. Finally, the parties provided that the district court would retain jurisdiction over the case to enforce the terms of the settlement agreement.

Appendix A

After carefully reviewing the mid- and post-trial settlements reached by the parties, the district court, in March 1999, approved both settlement agreements, finding each to be fair, reasonable, and adequate. In the same order, the district court took up class counsel's requests for attorneys' fees, costs, and an incentive award for the lead plaintiff. Although none of the Montgomery defendants challenged class counsel's requests, as the requests were within the bounds established by the settlement agreement, objections were received from class members. Primarily, these came from three Aetna Plywood managers, Larry Rassin, Keith Weller, and Jon Minnaert. The district court reviewed carefully both class counsel's requests and the objections submitted, as well as the numerous considerations relevant to determining an appropriate attorneys' fee, expense reimbursement, and incentive award. Based on this review, and using the percentage-of-recovery method for awarding attorneys' fees, the court awarded class counsel 25% of the net settlement recovery (amounting to $1,655,177.71), 25% of any future class recovery, and $279,289.15 in expense reimbursements. The court declined to award class counsel any portion of the stock promised to the class and refused to grant the lead plaintiff an incentive award. A subsequent order granted class counsel an additional $20,000 in expense reimbursements, but reaffirmed the district court's refusal to grant a reimbursement for computer-assisted legal research costs.

At the same time the district court was considering the fairness of the two settlements and the appropriateness of class counsel's requests for attorneys' fees, costs, and an incentive award, the parties also brought before the court an ownership restructuring plan proposed by Aetna Plywood.

Pursuant to this plan, which was submitted to the district court in February 1999, Davis would relinquish his stock to Aetna Plywood in exchange for $1,000 and the company would give that stock (as well as the $1,000) to the class; then, Aetna Plywood would issue new stock representing 80% of the total number of outstanding shares; finally, Aetna Plywood would turn 29% of the company's stock over to its attorneys to pay for services rendered and would sell the remaining 51% to a group of managers (Rassin, Weller, Minnaert, and Scott Halden) for $4,000. The class objected to the plan on the ground that it did not maximize the value Aetna Plywood could have received for selling a controlling interest in the company. After briefing on the issues raised by the restructuring plan, the district court, in April 1999, gave its consent to the proposed restructuring.

Around this same time, class counsel discovered that Aetna Plywood had funded the objections Rassin, Weller, and Minnaert filed opposing class counsel's request for attorneys' fees. Believing this violated the parties' settlement agreement, class counsel filed suit against Aetna Plywood, Rassin, Weller, Minnaert, and Halden ("the Krislov defendants") in the Circuit Court of Cook County, Illinois, asserting a breach of contract claim. In response, the Krislov defendants removed the case to federal court and filed a motion to dismiss. Class counsel then filed a motion to remand the case to state court and, in the alternative, asked for leave to file an amended complaint. The district court denied the motion to remand, but granted class counsel leave to amend. Class counsel then added claims of aiding and abetting a breach of contract and intentional interference with a contractual relationship against the individual Krislov

defendants. Following a second motion to dismiss, the district court, in December 1999, concluded that class counsel had failed to state a claim against the Krislov defendants and dismissed class counsel's suit.

In July 1999, the district court entered final judgment in the Montgomery class action suit, and in December 1999, did the same in the Krislov suit. Timely appeals were filed in both cases.

II

A. Legality of Ownership Restructuring Plan

The first issue raised in these appeals concerns the district court's decision to allow Aetna Plywood to go forward with its proposed ownership restructuring plan. The class contends that the restructuring plan violates Delaware corporate law by giving away control of the company for less than fair market value. Specifically, the class alleges that, in adopting the restructuring plan, Aetna Plywood's board of directors breached its fiduciary duty to maximize the value a corporation's shareholders receive in a corporate control transaction.[1] See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 48 (Del.1994). The district court rejected the class's objections on the ground

1. In passing, the class suggests that the reorganization plan also represents a waste of corporate assets, an independent breach of fiduciary duty, see *Sanders v. Wang*, No. 16640, 1999 WL 1044880, at *10 (Del.Ch. Nov.8, 1999), but it does not pursue this theory with any vigor. In any event, the analysis that follows would apply equally to any claim based on such a theory.

that the company's stock belonged to Davis and he could do with it what he wanted. The district court's conclusion rests on a faulty premise, however; Davis's stock went to the class (and even then only after being sold to Aetna Plywood), while the stock given to the company's attorneys and sold to the management group was newly-issued stock. On appeal, the Montgomery defendants attempt to defend the district court's decision on the grounds that (1) the class lacks standing to challenge the restructuring plan under Delaware law; and (2) the proposed transaction did not trigger any fiduciary duty toward the class to maximize value received. We only discuss the first of these contentions, however, as it is dispositive.

Delaware law requires that the plaintiff in a derivative suit (the form that the parties assume the class's objections take) be a stockholder of the corporation at the time of the challenged transaction. 8 Del.Code § 327. To determine whether the class has standing under this rule, we must determine who is a "stockholder" and what is the "time of the challenged transaction" for purposes of 8 Del.Code § 327.

Taking the second question first, a review of Delaware law reveals that the "time of the challenged transaction" depends on precisely what about the transaction is being challenged. Where the plaintiff complains of the terms, rather than the actual consummation, of a transaction, the "time of the challenged transaction" is when the terms of the transaction are established. *7547 Partners v. Beck*, 682 A.2d 160, 161-63 (Del.1996). For instance, in *7547 Partners*, the Delaware Supreme Court considered a case involving a

plaintiff that bought stock in an initial public offering at a price much higher than that paid by certain corporate executives to whom the corporation's board of directors had decided to sell stock in a private placement accompanying the public offering. *Id.* at 161. The court determined that the plaintiff lacked standing because the challenged transaction was the decision to set the price for the private placement, a decision that took place before the plaintiff bought its stock. *Id.* at 162-63. The court reasoned that because the plaintiff challenged only the terms of the private placement, rather than the technicality of its consummation, the challenged transaction took place when the terms of the private placement were established. *Id.* at 163. Here, the class complains only about one of the terms of the restructuring plan — the price at which the board of directors sold control of Aetna Plywood — a term that was announced (and therefore established) one month prior to final approval of the parties' settlement agreement. Thus, the challenged transaction took place before the class came into actual possession of the Aetna Plywood stock promised to it.

This conclusion brings into focus the question we have yet to answer — who, for standing purposes, is a "stockholder." In light of our conclusion about when the transaction the class challenges took place, the class will have standing only if a prospective stockholder can be considered a "stockholder" for standing purposes. Unfortunately for the class, Delaware law treats actual stockholders and prospective stockholders quite differently. Most significantly, prospective stockholders are not owed fiduciary duties. *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174-77 (Del.1988). Fiduciary

duties arise only after a stockholder comes into actual possession of stock, regardless of how certain the stockholder's future ownership was when the challenged transaction took place. *Id.* For instance, in *Anadarko Petroleum*, the Delaware Supreme Court held that directors of a wholly-owned corporate subsidiary about to be spun off owed no fiduciary duties to the post-spin-off stockholders even though those stockholders had been identified and those holders' future stock interests were being traded on the New York Stock Exchange. *Id.* The court reasoned that because the prospective stockholders did not acquire legal or equitable title over the stock of the subsidiary until the day the stock was distributed, they were not owed fiduciary duties until that day. *Id.* at 1176. That prospective stockholders are not owed fiduciary duties under Delaware law leads us to conclude that prospective stockholders would not be considered "stockholders" for standing purposes. Accordingly, we hold that the class was not a stockholder at the time of the transaction it challenges.

In an effort to avoid the necessary implication of this conclusion — that it lacks standing to challenge the restructuring plan under Delaware law — the class contends that ERISA and the settlement agreement itself grant the class standing. Certainly the settlement agreement and perhaps ERISA as well grant the class standing to challenge the restructuring plan, but, so far as we can tell, neither grants standing to raise a challenge under Delaware law that Delaware law itself would not permit. And, the class has not cited any legal authority to the contrary, nor has it articulated a theory that suggests we should rule otherwise. As the class only challenges the restructuring plan under Delaware law,

it must satisfy the standing requirements of 8 Del.Code § 327.[2] Because it was not a stockholder at the time of the challenged transaction, the class can not do so. Therefore, we must affirm the district court's rejection of the class's challenge to Aetna Plywood's ownership restructuring plan.

B. Attorneys' Fees, Costs, and the Incentive Award

Class counsel challenges several aspects of the district court's decisions regarding attorneys' fees, costs, and the requested incentive award for the lead plaintiff. Specifically, counsel argues that the district court should have: (1) awarded it 33-1/3% of the gross settlement recovery; (2) awarded it a like percentage of the stock promised to the class; (3) included computer-assisted legal research costs in the expense reimbursement; and (4) granted the lead plaintiff an incentive award. We review the district court's decisions respecting these matters for abuse of discretion, except where counsel challenges the methodology employed by the district court, in which case our review becomes plenary. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir.1991).

Before getting to class counsel's specific challenges, we note that in cases like the present one, where the district court

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2. We note, nevertheless, that Delaware appears to have a doctrine of equitable standing that allows for standing in certain circumstances when 8 Del.Code § 327 would otherwise deny standing to a plaintiff. See *Shaev v. Wyly*, No. 15559-NC, 1998 WL 13858 (Del.Ch. Jan.6, 1998), reargument denied, 1998 WL 118200 (Del.Ch. Mar.6, 1998). But, the class does not invoke this doctrine and it is far from obvious that the doctrine would grant the class standing. As such, we decline to explore the possibility that the class may qualify for equitable standing.

is asked to award reasonable attorneys' fees or reasonable costs, the measure of what is reasonable is what an attorney would receive from a paying client in a similar case. *Cook v. Niedert*, 142 F.3d 1004, 1012 (7th Cir.1998); *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568, 570, 573 (7th Cir.1992). This standard obviates, at least to a certain extent, the need to assign a value to an attorney's work based on nothing more than a subjective judgment regarding that work. It gives a court a background against which to work by requiring courts to look to evidence regarding the sorts of fees and costs generated in analogous suits funded by paying clients. To the extent possible, then, our analysis in this case will be guided by this methodology.

We begin with class counsel's contention that its fee should be based on the gross settlement recovery — the settlement recovery before counsel's cost award is deducted — rather than the net recovery — the recovery after the cost award is deducted. Counsel cites no authority standing for the proposition that gross recovery is to be preferred over net recovery as the basis for calculating a fee under the percentage-of-recovery method, nor has our review of the relevant case law revealed any authority to that effect. Moreover, counsel has not come forward with evidence indicating that private contingent fee agreements typically employ one or the other basis, nor has counsel suggested any logical reason that gross recovery should be the preferred basis. As such, it is impossible to conclude that the district court abused its discretion in using net recovery as a basis for awarding attorneys' fees.

Appendix A

We consider next class counsel's complaint that the district court should have awarded counsel a greater percentage of the settlement recovery, 33-1/3% rather than 25%. Counsel contends that the district court, in adopting what it found to be the median percentage-of-recovery figure used in securities cases, failed to adequately appreciate the riskiness of this case. The district court concluded that the case was not particularly risky because the fact (although not the amount) of the Montgomery defendants' liability could not be doubted. Although a reasonable argument can be made that the case was more risky than the district court thought, the district court's assessment of the risk involved is not without support. It is fairly obvious that at least some of the Montgomery defendants (most notably Jeff Davis) plainly were not acting in the best interests of Aetna Plywood's shareholders or in the best interest of the ESOP. Moreover, a lack of risk was not the only reason the district court gave for refusing to select a percentage-of-recovery figure greater than the median; the court also noted that the large settlement recovery counseled against a high figure. In fact, the court undertook a careful analysis of both the factors weighing in favor of a greater-than-median percentage figure and those weighing against such a figure. Because it is impossible to say that the district court's balancing of these factors was unreasonable, we cannot conclude that the district court abused its discretion in selecting 25% as the appropriate percentage-of-recovery figure.

We come, then, to class counsel's challenge to the district court's refusal to award counsel a portion of the stock the settlement agreement promised to the class. Counsel contends that the stock obtained for the class should be

treated just as the cash obtained for the class is treated. The district court's only reason for not awarding counsel stock was that counsel's fee was already substantial. We do not believe this is an adequate reason for denying counsel stock. Stock, like cash, is simply a form of compensation secured on the class's behalf. There is no reason it should be treated differently than cash. In fact, treating it differently creates perverse incentives for attorneys by encouraging them to seek all cash recoveries even when a cash and stock recovery would be in their clients' best interest or would otherwise be more appropriate. If a court believes a fee award would be too large if stock is made part of the award, then it should reduce the percentage-of-recovery figure (something which, as noted above, the district court here essentially did). Although we have not discovered any significant authority on this matter, and the record does not reveal how private contingent fee arrangements in securities cases treat awards of stock, we are convinced that the district court's refusal to award class counsel any of the stock obtained for the class is unreasonable. As such, we conclude that the district court abused its discretion in so ruling.

We next turn to class counsel's claim that the district court erred in refusing to include in the expense reimbursement award computer-assisted legal research costs. Counsel contends that the district court should have included these costs in the reimbursement award because the private market compensates lawyers for these costs and to do otherwise would violate the ethical rules regarding the payment of costs by attorneys. Counsel's arguments are misguided. Computer research charges are considered a form of attorneys' fees. *Haroco, Inc. v. American Nat'l Bank &*

Trust Co. of Chicago, 38 F.3d 1429, 1440-41 (7th Cir.1994); *Harman*, 945 F.2d at 976. The idea is that computer-assisted legal research essentially raises an attorney's average hourly rate as it reduces (at least in theory) the number of hours that must be billed. *Haroco*, 38 F.3d at 1440-41; *Harman*, 945 F.2d at 976. As a form of attorneys' fees, the charges associated with such research are not separately recoverable expenses. When a court uses the percentage-of-recovery method of calculating attorney's fees, such charges are simply subsumed in the award of attorneys' fees.[3] Here, therefore, counsel's arguments regarding the necessity of separately recoverable computer research charges are not persuasive because counsel has already been compensated for the computer research charges it incurred through the attorneys' fee awarded it. Thus, we conclude that the district court did not abuse its discretion or otherwise err in excluding computer-assisted legal research charges from the expenses awarded class counsel.

Finally, we take up class counsel's challenge to the district court's decision to deny the lead plaintiff an incentive award for his participation in this case. Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit. *Cook*, 142 F.3d at 1016; *Continental Ill. Sec. Litig.*, 962 F.2d at 571-72. Counsel claims that the circumstances of the lead plaintiff's participation require that he be awarded $30,000 out of the settlement fund. Without directly addressing

3. When a court uses the lodestar method of calculating attorney's fees, computer research charges are separately recoverable, but (and this is the important point) only as a type of attorneys' fee, not as an expense. *Haroco*, 38 F.3d at 1440-41.

whether the lead plaintiff's participation justified an incentive award, the district court gave three reasons for refusing to grant such an award: (1) counsel's failure to make any serious argument in favor of granting such an award (especially in the amount requested); (2) counsel's failure to include in the most recent notice to the class adequate information regarding counsel's plan to seek an incentive award; and (3) the possibility that counsel could pay an incentive award out of the fees awarded it.

Although the district court's last reason for its ruling is not a particularly persuasive one, the other two carry significant weight. Counsel's uncertain and less than vigorous efforts to seek an incentive award in the district court can reasonably be interpreted as an abandonment of its request for such an award. In any event, the case for granting the lead plaintiff in this case an incentive award is not so overwhelming as to remove any doubt about whether an award would be appropriate. While the lead plaintiff was the only named plaintiff, was subjected to a rough deposition, and was portrayed by the Montgomery defendants in an unfavorable light during the litigation, it does not appear that he had to devote an inordinate amount of time to the case or that, as a former employee, he suffered or risked any retaliation by Aetna Plywood. Accordingly, we conclude that the district court did not abuse its discretion in refusing to grant the lead plaintiff an incentive award.

C. State Law Action

The final issue in this case is whether the district court properly disposed of class counsel's lawsuit against Aetna

Plywood and the four managers who purchased control of the company ("the Krislov suit"). The district court assumed jurisdiction over the suit, which was filed originally in state court and alleged a variety of state law causes of action arising out of a purported breach of the attorneys' fees provision of the settlement agreement, and dismissed the suit for failure to state a claim. Class counsel challenges both the district court's refusal to remand the lawsuit back to state court and the district court's decision to dismiss the lawsuit on its merits. We consider counsel's jurisdictional challenge first.

1. Assumption of Jurisdiction

Class counsel contends that there was no basis for removing the Krislov suit to federal court and that, therefore, the district court should have remanded the case back to state court. Ordinarily, a case filed in state court can be removed to federal court only if the case falls within the original jurisdiction of the federal district courts. 28 U.S.C. § 1441. Because it is based entirely on state law and involves non-diverse parties, however, the Krislov suit does not come within the original jurisdiction of the federal district courts. The district court nevertheless concluded that removal was proper under the doctrine of ancillary jurisdiction since the lawsuit involved claims relating to an alleged breach of the settlement agreement resolving the Montgomery case and the court had expressly retained jurisdiction to enforce the terms of that settlement agreement when it entered a final judgment in the Montgomery case.

Precedent in this circuit firmly establishes that the doctrine of ancillary jurisdiction confers federal jurisdiction

over a case otherwise outside federal jurisdiction in which the plaintiff seeks to enforce a settlement agreement, as long as the district court incorporated the agreement into its final order or retained jurisdiction to enforce the terms of the agreement. *Ford v. Neese*, 119 F.3d 560, 562 (7th Cir.1997); *In re VMS Sec. Litig.*, 103 F.3d 1317, 1321-22 (7th Cir.1996); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir.1994); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir.1985); see also *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Thus, where a party to a settlement agreement approved by a federal court brings a new suit in federal court alleging a breach of the agreement, federal jurisdiction exists over the suit, provided the federal court incorporated the agreement into its final order or reserved jurisdiction to enforce the agreement. See, *e.g.*, *Ford*, 119 F.3d at 562; *McCall-Bey*, 777 F.2d at 1188-90.

What is less firmly established is when a case filed in state court that nevertheless comes within a federal court's ancillary jurisdiction may be removed. Our court addressed this issue in *In re VMS Securities Litigation*, 103 F.3d 1317 (7th Cir.1996), which considered whether a pair of district courts had properly removed and enjoined a state law class action alleging fraud and misrepresentation relating to the settlement of a pair of prior class action lawsuits approved by those two district courts. The court first determined that the two district courts possessed ancillary jurisdiction over the state law actions at issue. *Id.* at 1321-23. The court then turned to whether the district courts had the authority to remove the state law actions from state court. Relying on authority from the Second Circuit, specifically *In re "Agent*

Orange" Product Liability Litigation, 996 F.2d 1425, 1431-32 (2d Cir.1993), the court concluded that the All Writs Act, 28 U.S.C. § 1651, which provides that federal courts may issue orders "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," granted the district courts the necessary authority. 103 F.3d at 1323-24. The court explained, however, that the All Writs Act does not permit removal in every case. *Id.* at 1324. Again relying on the Second Circuit's decision in *In re Agent Orange*, the court suggested that only the presence of exceptional circumstances threatening the integrity of a court's rulings in complex litigation would justify removal under the All Writs Act.[4] *Id.*

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4. The court's ruling regarding removal under the All Writs Act is in accord with the weight of the authority from the other courts of appeals that have considered the issue. See *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir.1999); *NAACP, Minneapolis Branch v. Metropolitan Council*, 125 F.3d 1171, 1173-74 (8th Cir.1997), reinstated after remand, 144 F.3d 1168, 1171-72 (8th Cir.1998); *Davis v. Glanton*, 107 F.3d 1044, 1047 n. 4 (3d Cir.1997); *In re Agent Orange*, 996 F.2d at 1431-32. But see *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1378-80 (11th Cir.1998) (declining to take a position, but holding that removal was improper even if the All Writs Act might authorize removal in some cases); *Hillman v. Webley*, 115 F.3d 1461, 1467-69 (10th Cir.1997) (rejecting the All Writs Act as a basis for removal). The only authority to the contrary, the Tenth Circuit's *Hillman* decision, which rests on circuit precedent holding that the All Writs Act does not independently confer federal jurisdiction, overlooks one of the key points underlying *In re VMS Securities* and the similar cases from other circuits. In those cases federal jurisdiction exists by virtue of the ancillary jurisdiction doctrine (though the other circuits do not use the term "ancillary jurisdiction"), not by virtue of the All Writs Act. The All Writs Act is simply the source of authority for removal.

Appendix A

Reading *In re VMS Securities* together with this circuit's law on ancillary jurisdiction, two different standards for exercising ancillary jurisdiction emerge. In a suit otherwise outside federal jurisdiction brought in *federal* court, a district court may assume jurisdiction over the suit if it satisfies the ordinary requirements for ancillary jurisdiction. In a suit otherwise outside federal jurisdiction brought in *state* court, a district court may assume jurisdiction over the suit if it satisfies the ordinary requirements for ancillary jurisdiction and exceptional circumstances threatening the integrity of its prior rulings are present.[5]

Strictly speaking, the Krislov suit does not involve the sort of extraordinary circumstances described in *In re VMS Securities*. Any threat it presents to the integrity of the district court's rulings in the Montgomery case is minimal, involving ordinary collateral estoppel and res judicata issues. *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1380 (11th Cir.1998) (holding that such a threat would not supply exceptional circumstances); *In re Agent Orange*, 996 F.2d at 1431 (suggesting the same). And, the Montgomery case was not particularly complex litigation — it was a relatively straightforward class action.

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5. While the lack of symmetry between the treatment of cases filed in state court and federal court may appear to be incongruous, it is justified by the necessity of remaining faithful to the important limitations on the use of the All Writs Act. Moreover, a standard for removing a case from state court that is more demanding than the standard for assuming jurisdiction over a case filed in federal court pays heed to the legitimate comity concerns raised by the removal of a state law action that does not fall under any of the established heads of federal jurisdiction.

Still, the Krislov suit is not an ordinary action to enforce a term of a settlement agreement involving a dispute regarding whether a party has reneged on its post-judgment obligations through some out-of-court action or failure to act. Rather, the Krislov suit involves a dispute over whether the Krislov defendants reneged on their pre-judgment obligations by obtaining a ruling (they promised not to seek) from the district court. The district court is uniquely positioned to resolve this sort of dispute. It involves events that occurred before the court and revolves, in part, around the impetus for one of the district court's rulings. Moreover, it would be awkward, to say the least, for a state court to pass on certain issues raised by this case, such as what prompted the district court to rule in the way it did. In our view, the unusual nature of the Krislov suit — involving the alleged procurement of a court ruling through a breach of a pre-judgment settlement obligation — does present a set of circumstances that make it appropriate for a federal court to remove a case from state court in aid of its jurisdiction. Therefore, although it does not involve the sort of extraordinary circumstances described in *In re VMS Securities*, we conclude that the Krislov suit does involve a set of extraordinary circumstances that justifies removal under the All Writs Act. Accordingly, the district court properly assumed jurisdiction over the Krislov suit and did not err in refusing to remand the case to state court.

2. Merits

Class counsel also contends that the district court erred in dismissing the Krislov suit on its merits. The suit alleged

a breach of contract claim against Aetna Plywood and the four managers who purchased control of the company, as well as claims of aiding and abetting a breach of contract and intentional interference with a contractual relationship against the individual defendants, all arising out of the defendants' efforts to oppose class counsel's request for attorneys' fees, in violation of the settlement agreement resolving the Montgomery case. In dismissing the lawsuit, the district court concluded that class counsel was collaterally estopped from arguing that the amount of attorneys' fees the court awarded was other than the proper amount and that, consequently, counsel could not establish that the alleged breach of contract (or associated aiding and abetting and intentional interference) caused it any damages. On appeal, the Krislov defendants advance this argument, as well as several others, in support of the district court's decision. We need not go through each argument they make, however, as their argument that class counsel cannot establish causation is dispositive.

The Krislov defendants argue that, because the district court made an independent determination as to the appropriate attorneys' fee (as it is required to do, see *Strong v. BellSouth Telecomms. Inc.*, 137 F.3d 844, 849-50 (5th Cir.1998)), class counsel cannot establish that they caused counsel's alleged damages, an element of each of the causes of action at issue, see *Dallis v. Don Cunningham & Assocs.*, 11 F.3d 713, 717 (7th Cir.1993) (tortious/intentional interference with contract); *Gonzalzles v. American Express Credit Corp.*, 315 Ill.App.3d 199, 247 Ill.Dec. 881, 733 N.E.2d 345, 351 (2000) (breach of contract); Restatement

(Second) of Torts § 876 (1979) aiding and abetting.[6] We agree. It would be impossible for class counsel to prove that the objections filed by Rassin, Minnaert, and Weller, rather than the district court's efforts in fulfilling its duty to independently evaluate counsel's attorneys' fee request, were the proximate cause of any alleged diminution of counsel's attorneys' fee award. The district court did cite the objections filed by Rassin, Minnaert, and Weller, but that only means that the court read, and perhaps was persuaded by, their objections, it says nothing about whether the court would have reached a different result in the absence of the objections or whether the objections caused the court to rule the way it did. In fact, assuming (as we always do) that the district court took its duty to independently evaluate class counsel's request seriously, the only proximate cause of the court's ruling could be its own determination that the amount of attorneys' fees awarded was an appropriate amount. In short, it is impossible, as a matter of law, to establish the proximate cause for a judicial ruling of the sort involved here. Accordingly, the Krislov suit deserved to be dismissed for failure to state a claim.

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6. Class counsel cites, and we have discovered, no Illinois case recognizing a cause of action for aiding and abetting a breach of contract, but counsel does point to § 876 of the Restatement (Second) of Torts, which sets out a cause of action for, among other things, providing substantial assistance or encouragement to another's tortious acts. Because a breach of contract is not a tortious act, § 876 does not support class counsel's aiding and abetting claim, see *Reuben H. Donnelley Corp. v. Brauer*, 275 Ill.App.3d 300, 211 Ill.Dec. 779, 655 N.E.2d 1162, 1169-71 (1995), but even if it did, causation is an element of the cause of action. Restatement (Second) of Torts § 876 cmt. d (1979) (noting that ordinary principles of tort causation apply).

Appendix A

III

Because the class in the Montgomery case lacks standing to challenge Aetna Plywood's ownership restructuring plan, we affirm the district court's rejection of the class's challenge to that plan. We also affirm all of the district court's decisions regarding attorneys' fees, costs, and the requested incentive award, except its decision to not award class counsel any of the Aetna Plywood stock obtained for the class, which we reverse. Finally, we affirm the district court's decision to dismiss class counsel's state law action.

AFFIRMED in part, REVERSED in part.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS AND MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 2, 1999

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 3193

HOWARD R. MONTGOMERY, et al.,

Plaintiffs,

vs.

AETNA PLYWOOD, INC., et al.,

Defendants.

Chicago, Illinois
June 2, 1999
11:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. HART

* * *

[2] THE CLERK: 95 C 3193, Montgomery versus Aetna Plywood.

Appendix B

MR. KRISLOV: Good morning, Your Honor.

Clint Krislov With Rob Stein on behalf of the plaintiff and the class.

MS. KLAUS: Kate Klaus on behalf of Aetna Plywood.

MR. COLLINS: George Collins as president of Aetna Plywood as well as counsel.

THE COURT: Well, you confuse me, Mr. Krislov. I just saw a notice of appeal filed. I don't have jurisdiction once you file a notice of appeal.

MR. KRISLOV: If the court has not completed — what we were uncertain of, and we felt we needed to protect ourselves because you issued one of those judgment forms.

THE COURT: Yes, I issued a judgment. The case is over. I am not your chancellor for life here.

MR. KRISLOV: I understand that, Your Honor, but also if you want to view this as a motion to reconsider on the approval of the transfer shares to Rassin, that would be in order, and we will be glad to file another notice of appeal. That's no problem.

What we think, Your Honor, is that there has been a fraud perpetrated on the Court by the Rassin group back to the beginning when they were asserting that they were seeking to intervene on behalf of certain class members, to oppose class [3] certification, to go through, to oppose our

pursuing the case at trial, to oppose our fees, and we said that we believed that it was a put-up job initially by Jeffrey Davis.

At some point, Your Honor, there has to be some accountability for presenting one position to the Court, and it just not being true.

They seek to remedy this by the document that we got this morning where they wrote their check for $14,000 back to the company. I don't know which amount, which actions that reimburses the company for. It may be just for the recent actions of Mr. Beiderman in challenging my fee.

But the rest of the time, Your Honor, we believe and we think that we have at least sufficient evidence to raise the specter that the Rassin group has been doing this all as a put-up job, whether it was initially with Mr. Davis or even this transfer for $4,000.

They point out that we haven't offered a supersedeas bond to enjoin the transfer, and that's true, but I will be certainly glad to post a bond in the amount of $4,000 which is what they are paying for the shares.

Your Honor, I believe that you must be forthright with the Court, and there has got to be accountability, not just that you pay back the people who are fronting your efforts.

So I believe Your Honor certainly has the jurisdiction for either a fraud that was perpetrated on the Court, to this

[4] Court, or to treat this as a motion to reconsider this Court's approval of the issuance of 51 percent control to the Rassin group for $4,000.

MS. KLAUS: That notion would be untimely, Judge. You need to file those 10 days after the judgment. This was not filed within 10 days.

MR. KRISLOV: You can file them later for newly discovered evidence, Your Honor.

Your Honor still has jurisdiction over this. We're still supposed to be reporting to the Court on the 15th on our efforts to get distribution to class members. So until the case is all over, it's not over. So this Court does still have jurisdiction.

THE COURT: I don't know what you want. You say: Wherefore tell the company and the Rassin group to account fully for the payment of the Rassin group's legal fees for actions done in this litigation and to restrain or freeze the shares from issuance or transfer to the Rassin group until satisfactorily explained.

MR. KRISLOV: We were not aware whether the shares had been transferred already to the Rassin group. We now know that they have not. We want them to be enjoined, we want the company to enjoin them from issuing the shares to the Rassin group.

THE COURT: I don't think any of this is properly [5] raised, Mr. Krislov. I will deny your motion.

MS. KLAUS: Thank you, Judge.

MR. KRISLOV: Your Honor, I guess we need the report by the 15th for status on the distribution. We still have not been able to get anybody in the company to issue us some certified list of what the percent, what the shares were with respect to how we are going to distribute the money. They have this information, we don't. There are three different numbers of shares that we have been told at different times, and without anyone —

THE COURT: Mr. Krislov, you ought to know me by now.

MR. KRISLOV: You only do what's before you.

THE COURT: Right. I don't deal in oral motions. I am not as smart as you are. I have got to see it in front of me and figure out what I ought to do. I can't tell what —

MR. KRISLOV: We will file it in our report, Your Honor.

MS. KLAUS: Thank you, Judge.

MR. KRISLOV: Thank you, Your Honor. (Proceedings concluded.)

* * * *

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Clinton A. Krislov
Krislov & Associates, Ltd.
222 North LaSalle Street
Suite 2120
Chicago, IL 60601-1086

Case Number: 1:95-cv-03193

Title: Montgomery v. Aetna Plywood Inc
Assigned Judge: Honorable William T. Hart

MINUTE ORDER of 6/2/99 by Hon. William T. Hart : For the reasons stated in open court, the class counsel's request for accounting and injunction against Share Transfer to Rassin Group's motion is denied. [419-1] Mailed notice

This docket entry was made by the Clerk on June 7, 1999

* * * *

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 3, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 3193

HOWARD R. MONTGOMERY, for himself and for all others similarly situated for themselves and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan,
Nominal Defendant,

Plaintiff,

v.

AETNA PLYWOOD, INC., a Delaware corporation, JEFFREY DAVIS, JOHN FRANCIONE, PETER C. JOHN, and PETER THOMSEN, Defendants.

May 3, 1999

MEMORANDUM OPINION AND ORDER

HART, District J.

In open court on April 22, 1999, the court orally ruled on various pending motions, including class counsel's request for reconsideration of the prior ruling on fees and expenses. The court granted class counsel's request for

reconsideration as to photocopy expenses and awarded class counsel an additional $20,000 of photocopy expense reimbursement. All other aspects of the motion were denied, including the denial of any additional expenses for computer-assisted legal research. It was stated that such expenses are actually part of attorney fees and, since counsel was being awarded fees on a percentage basis, no separate award should have been made for these expenses. However, counsel was informed that, if his research indicated otherwise, he could submit an additional brief pointing to contrary authority. Also, since no party or class member indicated an intent to appeal any of the rulings, it was also ruled that the prior order that further disbursement of fees await the expiration of the time for appeal would be lifted.

Class counsel subsequently filed his renewed motion for reconsideration of reimbursement for Westlaw expenses and other issues of fees and incentive award. Since the court has already ruled on the other issues and only permitted further briefing as to the Westlaw expenses, Westlaw expenses is the only issue that will be discussed other than a few points of clarification.

Class counsel apparently misunderstood the April 22 ruling regarding Westlaw charges. This court did not hold that such charges are part of overhead that should not be separately billed to a client or separately included in the usual fee petition. It was held that Westlaw charges are properly characterized as attorney fees, not costs or expenses of litigation. See Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago, 38 F.3d 1429, 1440-41 (7th Cir.1994); McIlveen v. Stone Container Corp., 910 F.2d 1581, 1584

(7th Cir.1990); Uniroyal Goodrich Tire Co. v. Mutual Trading Corp ., 63 F.3d 516, 526 (7th Cir.1995), *cert. denied,* 516 U.S. 1115 (1996); Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co., 992 F.Supp. 980, 984 (N.D.Ill.1998), *appeal dismissed,* __ F.3d __, 1999 WL 71214 (7th Cir. Feb. 9, 1999). Because class counsel was awarded fees based on the percentage method, not the lodestar method, the percentage fee award already encompasses all fees. Just as no specific hourly charges of an attorney are added to the amount awarded on a percentage basis, no additions should be made for attorney fees represented by specific Westlaw charges. *Cf.* In re Rio Hair Naturalizer Products Liability Litigation, 1996 WL 780512 *19 (E.D.Mich. Dec. 20, 1996).[1] The cases cited by counsel are not to the contrary. They are all cases in which the fee award was based on the lodestar method, not the percentage method. Additionally, class counsel's invocation of the argument that denying Westlaw expenses is an incentive for attorneys to use the less efficient and more costly method of researching without computers, *see* In re Continental Illinois Securities Litigation, 962 F.3d 566, 570 (7th Cir.1992), is misplaced. That is an argument that applies only to lodestar fee awards. Since, under the percentage method, there is no direct connection between the fee award and hourly charges, today's ruling provides no incentive to incur more attorney time and less computer time. On the other hand, awarding Westlaw expenses in addition to the percentage award, as is

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1. Although Rio Hair refers to the computer-assisted legal research as part of attorney fee "overhead," the gist of the holding is that such expenses are part of attorney fees and therefore not separately awardable as an expense in addition to the percentage method fees already awarded.

urged by counsel, could be an incentive to overuse or overstate Westlaw time because it supports an additional reimbursement that attorney time alone does not.

In sum, since Westlaw expenses are properly characterized as part of attorney fees and since the percentage method determines the full amount of attorney fees, class counsel is not entitled to an additional reimbursement for Westlaw expenses.

As was stated in court, class counsel need not wait until the time for appeal has expired before disbursing his fee and reimbursed expenses from the escrow account.

The prior order that class counsel file an April 30, 1999 status report as to disbursements will be vacated. Instead such a report shall be submitted on June 15, 1999.

Class counsel's renewed motion for reconsideration indicates a misunderstanding as to the ruling on an incentive award for the named plaintiff. The March 16, 1999 Order denies such an award because no adequate showing had been made. Neither reconsideration motion states a basis for changing that determination. The March 16 Order makes reference to class counsel's representation that he would pay the incentive award out of his fee. That was a voluntary statement made by class counsel. No order requires class counsel to follow through with that representation.

IT IS THEREFORE ORDERED that class counsel's renewed motion for reconsideration of reimbursement for Westlaw expenses and other issues of fees and incentive

awards is denied. The Clerk of the Court is directed to enter a supplemental judgment awarding class counsel an additional $20,000 in expense reimbursements to be paid out of the class settlement fund. Disbursements from the escrow account to pay class counsel's fee and expense reimbursement award may begin after the entry of today's order. Class counsel's submission of a written status report regarding disbursements from the escrow fund is reset to June 15, 1999.

APPENDIX D — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 22, 1999

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 3193

HOWARD R. MONTGOMERY, et al.,

Plaintiffs,

vs.

AETNA PLYWOOD, INC., et al.,

Defendants.

Chicago, Illinois
April 22, 1999
11:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. HART

* * *

[2] THE CLERK: 95 C 3193, Montgomery versus Aetna Plywood; status and motions.

THE COURT: Good morning.

Appendix D

MR. KRISLOV: Good morning, Your Honor. Welcome back.

THE COURT: Thank you.

MR. KRISLOV: Clint Krislov on behalf of the plaintiffs in the class.

MR. TOWBIN: Steven Towbin on behalf of Aetna Plywood.

MR. COLLINS: George Collins For Jeffrey Davis and as president of Aetna.

MR. EIDE: David Eide on behalf of the management group, sometimes referred to as the Rassin group.

MR. RICKERT: And Ed Rickert on behalf of John Francione.

MR. STEIN: Rob Stein on behalf of the plaintiffs.

THE COURT: All right, there is a petition called petition for instruction. I am not sure of the format of it, but in any event, it has to do with the disposition of Mr. Davis's shares which were not part of the original settlement of the case. The proposal is to distribute, reissue the stock in a format that would result in the distribution of Mr. Davis's shares, some to the plaintiffs, some to an inside group, 51 percent as I understand it, and 29 percent to Mr. Collins and Mr. Leavitt.

The result here as I see it is it's Mr. Davis's stock [3] if he wants to distribute it. It was never part of the settlement that he had to surrender his stock ownership. The original judgment that I entered in this case was with respect to recovery of money. The parties then entered into settlement proposals and discussions and decided that there would be a settlement and an escrow arrangement.

Money was then produced to pay the liability claim which was somewhat reduced from what the amount would have produced in the event of a final judgment against the defendants.

That settlement was approved by the Court. Now, because of the jurisdiction of the Court over the company and the parties, approval was sought with respect to distribution of Mr. Davis's shares. Comments have been filed by the parties.

I am going to authorize the preparation of an order approving the transfer of stock as proposed by these parties who would receive the stock and with the conditions imposed that the plaintiffs' group would receive 20 percent of the stock as well.

You may draw an order to that effect.

MR. COLLINS: All right, Your Honor.

THE COURT: All right. The other matter before the Court has to do with the request for reconsideration of the class counsels' attorneys' fees and costs. I considered that.

[4] Mr. Krislov, is there anything else you want to say in connection with that matter, or is there anything else anybody else wants to say?

MR. KRISLOV: Your Honor, the thing that strikes me in this case, or for myself in this case, and for other people who undertake these type of cases in the future, there should be the incentive that once in a while when you have to work real hard and you get a good result, and it takes a long time and you are forced to go to the end, I think you deserve a percentage at the high end. I have said that.

The correction on the expense I think was an oversight by focusing on what we thought were the significant, the most significant attacks on our fee petition. We really did not anticipate the scrutiny of the Westlaw research or the copier, and I think we have satisfied that.

THE COURT: Well, the Westlaw research, actually we allowed half of the Westlaw research. There was no response to that. But arguably we should not have allowed the Westlaw research as expense. It should have been rolled into and considered as a part of the attorneys' fee expense, which is what the case law seems to indicate.

So I don't think you have been harmed by what we did there.

MR. KRISLOV: Your Honor, I beg to differ. If we spend money on Westlaw, and if that comes out of our fees, then [5] you have created a tremendous disincentive to incur these expenditures. It's sort of like dealing with the expert.

Appendix D

THE COURT: Well, you know, one of the things about your petition, Mr. Krislov, is that I will say this to you in general. I agree with the proposition that you should be reasonably well compensated so that people won't be discouraged from bringing this kind of suit. I agree with that proposition, and I think I have recognized that.

You do not give me any case law guidance which shows me that I erred in any respect. You have given me your petition, and you do well indicate to me how unhappy you are, but unhappiness is not the guideline here.

I think I am within the range in allowing you 25 percent. There is case law for 20 percent. I don't see any case law for 33 percent in a case like this where the pot is as large as it is and there is as much front-line time by the lawyer who is retaining the highest hourly rate.

Furthermore, if you measure this case based on the so-called lodestar system, I am over the amount that you would get on a pure lodestar basis even if you add a multiplier for a good result.

So on the overall basis of the fee allowed, I am not going to change the amount. You, of course, can disagree with me.

I don't think that I have given you an amount that [6] would discourage you or anyone else from managing a case of this kind. We have to disagree on that.

MR. KRISLOV: There is one point on which you had —

THE COURT: But let me finish just this comment.

MR. KRISLOV: Yes.

THE COURT: The way you would attack what I did is to show me case law that says what I did was wrong, and you did not either find them, and we didn't find them because we looked at what cases are allowing. You have to look at it from the standpoint of what the size of the pot is, what the result is, and what the case law allows typically on a percentage basis. We are right in there. If anything, some judges go lower than that.

MR. KRISLOV: On cases that settle, Your Honor, that settle before trial, that settle — I mean, in this business, the thing we get criticized for is you file a case, and everybody thinks somebody calls you up the next day and says: Will you take a million dollars and go away; or we will settle for whatever.

THE COURT: Well, you might have gone away if they had offered you a million dollars, but Mr. Dickie didn't offer you any money as I understood it.

MR. KRISLOV: Not — well, they eventually offered us a million dollars which we rejected.

But the fact is, Your Honor, most, virtually all those [7] cases are cases which were settled before trial, long before trial. We went through a trial.

THE COURT: I know. I have been here. I have had both kinds of cases, I have tried both kinds. I have approved

settlements in both kinds of cases. I have had some with incremental fees. The books will show you what I said, what the Court of Appeals have said.

MR. KRISLOV: Here is the only problem that I had with the way that you — you said on the one hand this was a tough case; everything was hard fought, it was hard fought, et cetera, and that would be entitled to a higher percentage. But offsetting that was the fact that you thought it was a low-risk case because we had from the beginning said that the violations were clear.

I think that that —

THE COURT: I thought they were clear. After I heard it and entered findings of fact and conclusions of law, I thought they were clear.

MR. KRISLOV: Your Honor, but we had submitted a motion for summary judgment. We had tried at various times — the fact that we presented a clear vision of the case and we presented it as a clear violation rather than presenting it as some complex valuation case I think was to our credit. I think very often, I think that's — I regard that as good lawyering.

You sort of put us in the position of saying in the [8] future, Your Honor, from the get-go: This is sort of a crummy case; we hope you won't sanction us for filing it. You know, I hope we win, but I don't think we will.

Then you would say down the road — and Judge Zagel had a similar case where he, a totally different case, but he

had a case in that vein where he first sanctioned plaintiffs' counsel in the Valcor case for having brought the case because their plaintiffs were really inadequate. He sanctioned them $100,000.

They then refiled the case, got three and a half million dollars. Judge Zagel give then a third. He said: This was such a worthless case to begin with, that you would get anything for them is a miraculous bit of lawyering, and I give you a third.

So we are sort of in a position we think we had a good case. It was hard fought. We presented it as a clear vision, and we presented — and I think in order to succeed in these, you need to have, you need to present it from the beginning as a clear vision.

But I think that's a good job, and I don't think we should be penalized or discounted for that.

So, anyway, that's why I feel that the percentage we merited was higher than just sort of right in there in the middle.

THE COURT: Okay. Well, I will deny the motion with [9] all due respect, and I hope you won't be discouraged. I don't think you should be when you finally go to the bank.

MR. KRISLOV: Your Honor, it has been four years since we filed it, you know. I appreciate — I don't anticipate — I mean, I would concur that 25 percent is certainly within the bracket. So, you know, we certainly don't anticipate appealing on that in spite of what they are telling the employees.

Appendix D

We would like you to increase the out-of-pocket intense reimbursement to the full amount rather than reduce it.

THE COURT: If you can find me a case that says that you should get that full amount of your —

MR. KRISLOV: Westlaw expenses?

THE COURT: — Westlaw expenses, send it to me, and I will amend the order.

MR. KRISLOV: Okay, we will do that.

THE COURT: But I don't think that is the way it works. But I am always glad to be educated.

MR. KRISLOV: With respect to the copying, Your Honor, we indicated —

THE COURT: Don't spend too much time on Westlaw.

MR. KRISLOV: No. We are mindful; we will keep it down. If we only get half of it, we will spend less —

THE COURT: I think you have fairly dealt with it. Certainly I want it fairly dealt it. So if you can find some law that tells me that I am wrong, I will be glad to look at [10] it.

MR. KRISLOV: Okay.

THE COURT: But do it quick now.

MR. KRISLOV: We will.

THE COURT: So we don't run into some time problem.

MR. KRISLOV: With respect to the copying charges, we provided our backup with —

THE COURT: All right, I will give you $20,000 additional costs to reflect your outside charges. I think it is high, but in relation to the total, since I don't think you ought to be penalized on costs. I will enter judgment for an additional $20,000 on account of costs.

MR. KRISLOV: Can we have that fee for the copying costs, and we will provide you support for the Westlaw?

THE COURT: Yes.

MR. KRISLOV: Okay.

MR. COLLINS: Judge, we had one other motion before you which was to ask you to provide that the funds would not be disbursed from the escrow until after we present this order on changing control. We need that for a tax reason if you don't mind doing that, just to have it —

THE COURT: All right. I don't see any reason why — I don't know how that all works, but I will take your representation.

MR. COLLINS: We looked it up, and the company will be [11] better off.

THE COURT: All right, draw an order to reflect what I have said here today.

MR. KRISLOV: Finally, Your Honor, it has been awhile. Might we take, since we are going to be deferred a little while longer making disbursements, can we take another hundred thousand in interim fees against our order?

THE COURT: Why did can't we get this all done so you can have the whole —

MR. COLLINS: I plan to draw my order this afternoon, Judge.

THE COURT: If you give me — within the week, we will have it all wound up. I don't want any — I want to give up this case, I want to give it all back to you folks and end this.

MR. COLLINS: And I want to resign as president.

THE COURT: Yes. Let's wind it up.

MR. KRISLOV: Okay. You have in your order that there is no further disbursements until it's final, past the appeal period. Can we delete that as far as the fees? I mean, I don't think anybody is going to object to it.

THE COURT: What do you have in mind here? I am not quite sure.

MR. COLLINS: All I have, I am going to present an order if I can this afternoon allowing this transfer of the [12] officership and control as Your Honor indicated. The finance company is agreeable to it, so it will go quickly. And then we are going to do that as soon as that order is entered.

I have no objection to his fees. It doesn't matter what I think, but I certainly have no objections to the fees Your Honor has ordered or the $20,000 additional.

We hope to do that. At that point, I don't care if the money is disbursed. I don't believe there is going to be an appeal though. He has the class, the Rassin group is here. I am the company. So nobody is going to appeal this.

THE COURT: Yes, you don't have to. Do what you want. You run some risk, but if you are willing to run that risk, that's your business.

MR. COLLINS: Sure, and I don't object, the company doesn't either.

THE COURT: So let's wind it up.

MR. KRISLOV: Okay. Can I clarify a couple — there's two other things that we are sort of unclear. One is the incentive award, I think you indicated in your opinion that the incentive award wasn't approved, but you implied that it could come out of the fee which I I don't know that I agree with you on conceptually, but I had already indicated —

THE COURT: I don't construe my own opinions.

MR. KRISLOV: I'm just —

THE COURT: I don't answer questions about my [13] opinions. I mean, I am not being flip with you. I just don't do that. You can interpret, you can read my opinion, you decide what you are supposed to do.

MR. KRISLOV: My problem is I don't know whether to give, to issue — if I take out $30,000 —

THE COURT: I have ruled.

MR. KRISLOV: Pardon?

THE COURT: I have ruled. I have ruled, I don't do that. That's the function of a lawyer. You take my opinion, you decide what it means.

MR. KRISLOV: Okay. With respect to my percentage of the shares, to my percentage of the class shares, the way you have it set up is that I can get the proceeds if the shares are sold, but I don't have title to the shares.

THE COURT: You know me pretty well by now. I rule on what I have in front of me. I don't have any of these questions in front of me.

MR. KRISLOV: Okay.

THE COURT: I have ruled on the what I ruled on, and that's it, and I bid you good day.

MR. KRISLOV: Thank you, Your Honor.

MR. COLLINS: Thank you, Your Honor.

(Proceedings concluded.)

* * * *

APPENDIX E — ORDER AND MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 CV 3193
Judge William T. Hart

HOWARD R. MONTGOMERY, for himself
and for all others similarly situated,

Plaintiffs,

for themselves and for AETNA PLYWOOD, INC. PROFIT SHARING PLAN, as successor to AETNA PLYWOOD, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

v.

AETNA PLYWOOD, INC., a Delaware Corporation, JEFFREY DAVIS, a trustee of Aetna Plywood, Inc. ESOP, JOHN FRANCIONE, a trustee of Aetna Plywood, Inc. ESOP, PETER JOHN, a trustee of Aetna Plywood, Inc. ESOP, and PETER THOMSEN, a trustee of Aetna Plywood, Inc. ESOP.

Defendants.

ORDER

Appendix E

Comes on this cause for hearing and ruling on the Petition of Aetna Plywood, Inc. and Jeffrey G. Davis for Instructions, ("the Petition") filed in this case on February 18, 1999, and on the Response thereto by Class Counsel, and the Replies to that Response, and the Court having considered the Petition and the pleadings filed by counsel and being advised in the premises, hereby;

Orders as follows:

1. The Petition of Aetna Plywood, Inc. and Jeffrey Davis for Instructions is granted. Aetna Plywood, Inc., may re-organize the distribution of its common shares in those percentages set forth in paragraphs 3 and 4 of the Petition.

2. The funds held in escrow by Class Counsel for distribution to the Class may not be disbursed to the Profit Sharing Plan until the transfer of shares under the re-organization plan set forth in the Petition has been completed.

3. The attorney fees and costs awarded by the Court may be distributed to Class counsel immediately but are subject to counsel's obligation to repay in the event final fees are ultimately awarded in a lesser amount.

4. Aetna Plywood Inc., shall file a certificate with the Clerk of this Court within thirty days setting forth the completion of the re-organization plan set forth in the Petition.

Entered at Chicago this 29 day of April, 1999.

s/ William T. Hart
United States District Judge

Appendix E

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge William T. Hart

* * *

CASE NUMBER 95 C 3193

DATE 4/29/1999

CASE TITLE Montgomery, et al. vs. Aetna Plywood, Inc., et al.

* * *

DOCKET ENTRY:

* * *

(10) ■ [Other docket entry] Enter draft order as to court's 4/22/99 oral rulings.

(11) ■ [For further detail see order attached to the original minute order.]

* * * *

APPENDIX F — MEMORANDUM OPINION AND ORDER AND MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 16, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 3193

HOWARD R. MONTGOMERY, for himself and for all others similarly situated for themselves and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan, Nominal Defendant,

Plaintiff,

v.

AETNA PLYWOOD, INC., a Delaware corporation, JEFFREY DAVIS, JOHN FRANCIONE, PETER C. JOHN, and PETER THOMSEN,

Defendants.

MEMORANDUM OPINION AND ORDER

This is a class action in which it was alleged that fiduciaries of an employee stock ownership plan and directors of a corporation breached their fiduciary duties in violation of the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Delaware corporate law. Defendants allegedly sold the stock of the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") for less than its fair value. Two of the defendants, Peter John and Peter Thomsen, settled as the trial of the merits of the case began (the "First Settlement"). Under the terms of the First Settlement, $800,000 was placed in escrow. Following a bench trial, defendants Aetna Plywood, Inc. ("Aetna"), Jeffrey Davis, and John Francione were found liable.[1] *See Montgomery v. Aetna Plywood, Inc.*, __ F. Supp. 2d __, 1998 WL 919754 (N.D. Ill. July 16, 1998) ("*Aetna III*"). As against the liable defendants, plaintiffs were awarded $4,272,114.60 in damages plus $2,971,705.57 prejudgment interest calculated through July 16, 1998 for a total of $7,243,820.17. *Id.* at *26. Plaintiffs were also awarded attorney fees to be determined at a later date. *Id.* at *27.

Post-trial motions were filed, but the class and the liable defendants continued to engage in extensive settlement negotiations. Eventually, those parties entered into a settlement agreement dated November 25, 1998 (the "Second Settlement"). Under the terms of the Second Settlement, Aetna placed $6,100,000 in escrow, the class is to receive 20% of Aetna's common stock, and, in the event of a sale of Aetna within three years after final approval of the Second Settlement, the class is to receive 25% of any proceeds in excess of $6,100,000. Davis was not required to contribute to the cash settlement, but he agreed to give up his ownership interest in the company and a building it used, and Davis

1. John and Thomsen will be referred to collectively as the "settling defendants." Aetna, Davis, and Francione will be referred to collectively as the "liable defendants."

also ceased receiving any further remuneration from the company other than certain medical insurance. Francione also did not contribute to the cash settlement, but did give up his right to appeal and to share in any benefits of the settlements that he would have been entitled to as a member of the ESOP.

Notice was sent to the class regarding the First Settlement and a fairness hearing was held on September 3, 1998. No class member filed written objections to the First Settlement and, at the fairness hearing, nobody spoke against the First Settlement. Later, notice was sent regarding the Second Settlement and a fairness hearing was held on February 23, 1999. There were no written or oral objections to the Second Settlement.[2]

As of the time of the first fairness hearing, plaintiffs' motion for attorney fees and expenses from the liable defendants was pending. Also pending was class counsel's request for fees to be paid out of the class recovery. Class counsel requested one-third of all damages, interest, and attorney fees collected by the class. The court had previously held that any amount awarded from the class recovery would be limited to a percentage of damages and interest; no such award was to be made based on a percentage of the fees recovered from defendants. *Aetna III*, 1998 WL 919754 at *27. Some members of the class objected to class counsel's fee request. Prior to a ruling on either of the pending attorney fee issues, the Second Settlement was reached with the liable

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2. Sheila Baniak spoke at the second fairness hearing and submitted a written letter. Although she asked a number of questions regarding the Second Settlement, she did not actually object to the settlement being approved.

defendants. The pending fee motions were denied as moot and class counsel submitted a new fee petition. Presently, class counsel seeks fees representing: one-third of the settlement payments plus a corresponding share of accumulated interest; one-third of the class's 20% stock interest; and one-third of any sale proceeds that might eventually be paid to the class. Class counsel also seeks reimbursement of expenses that it advanced on behalf of the class. Additionally, named plaintiff requests a $30,000 incentive award. Through counsel, three class members (the "Rassin Group") have filed a brief in opposition to class counsel's request for fees and named plaintiff's request for an incentive award. Additionally, other class members have submitted individual written objections to the fee request.

Approving a class settlement requires that a determination be made as to "whether the proposed settlement is lawful, fair, reasonable, and adequate." *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997) (quoting *Isby v. Bayn*, 75 F.3d 1191, 1196 (7th Cir. 1996)). It entails "a careful inquiry into the fairness of the settlement *to the class members* before allowing it to go into effect." *Id.* (quoting *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co. of Chicago*, 834 F.2d 677, 682 (7th Cir. 1987)). Factors to consider in making the determination include:

> 1) the strength of the plaintiff's case on the merits measured against the terms of the settlement; 2) the complexity, length, and expense of continued litigation; 3) the amount of opposition to the settlement among affected parties; 4) the

> presence of collusion in gaining a settlement; 5) the stage of the proceedings; and 6) the amount of discovery completed.

Id.

Familiarity with *Aetna III* is presumed. The detailed facts and legal discussion set forth in *Aetna III* will not be repeated here.

As the trial in this case was beginning, John and Thomsen entered into a settlement with plaintiffs whereby they agreed to pay $800,000 in settlement of all the claims against them, regardless of the outcome of the trial. This ensured that plaintiffs would receive some recovery even if unsuccessful at trial or unsuccessful in collecting any judgment against the other defendants. Potentially, it would not have increased the total recovery because the $800,000 would have acted as an offset against any recovery obtained against the other defendants at trial. *See Aetna III*, 1998 WL 919754 at *24. However, since a separate settlement was then reached with the other defendants, the First Settlement may in fact have resulted in an increased total recovery.

Here, the First Settlement occurred late in the case and did not avoid any significant expenses. The First Settlement did ensure that plaintiffs would recover $800,000 plus the interest that has been accruing since that amount was deposited in an escrow account on February 11, 1998. The amount accepted in settlement was reasonable in light of the potential risk of nonrecovery and the fact that plaintiffs still had the opportunity to be made whole by pursuing their

claims against the other defendants, including the defendants who may have had the deepest pockets. There does not appear to have been any collusion.[3] Also, no party or class member objects to the settlement. It is found that the settlement with John and Thomsen is fair, reasonable, and adequate. The First Settlement will be approved as fair and the claims against John and Thomsen will be dismissed with prejudice.

Assuming *Aetna III* would have been affirmed and that the settlement with the liable defendants had not been reached, the class would have recovered approximately $8 million, some additional interest,[4] and up to $1.4 million in fees and expenses to be paid by the liable defendants. This would be a total of approximately $8.5-9.5 million, depending on the amount of fees actually awarded. Presumably, to the extent the full amount would have been collected, the amount actually recovered by the class would have been reduced by the same 25% of the net recovery that

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3. Under some circumstances such an arrangement, under which the parties agreed to keep the First Settlement temporarily secret from the court might have raised some suspicions, but the decision to keep the First Settlement temporarily secret was approved by another judge of this court who supervised settlement negotiations. That secrecy facilitated this court's ability to decide the case on the merits, wholly unaffected by any implications as to liability or damages that might have been generated by knowledge of the partial settlement. It is also recognized that the other judge, whose supervision made him familiar with the basis for the settlement, found the First Settlement to be fair and reasonable.

4. The comparable figure would include postjudgment interest on the $7.2 million award through the date Aetna deposited the $6.1 million settlement payment in the escrow account.

is being awarded to class counsel today.[5] By comparison, the two settlements result in a $6.9 million cash payment. The cash payment itself is approximately $1.6-2.6 million less than the recovery obtained following trial, but it is not the only amount recovered as a result of the settlements. The Second Settlement also provides plaintiffs with 20% of Aetna's common stock and a possible percentage of sale proceeds. There is insufficient evidence to determine the value of the additional two items. It is the position of class counsel that the Second Settlement is at least equal in value to the recovery achieved at trial. Perhaps the value of the two items equals or exceeds $1.6-2.6 million, but that cannot be said with any reasonable degree of certainty. However, even if not equal, the Second Settlement at least comes close to matching the amount that was awarded as a result of the trial. Even assuming the largest possible difference, $6.9 million is 72.6% of the potential $9.5 million recovery.

The principal incentive for the Second Settlement was to ensure a substantial recovery from the liable defendants. Another important incentive was to structure a settlement that would enable Aetna to remain in business, thereby protecting the jobs of the numerous class members who are still employed by Aetna. Additionally, the Second Settlement avoids the possibility of *Aetna III* being overturned on post-trial motions or on appeal. Given the history of this case, it was likely that defendants (at least Aetna and Davis) would appeal any judgment against them and do the best they could to avoid or delay payment. Also, there apparently was a

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5. The percentage, though, would not apply to the amount of fees recovered from the liable defendants. *See Aetna III*, 1998 WL 919754 at * 27.

significant possibility that Aetna would go out of business, potentially reducing the amount that could be recovered and costing many class members their jobs.[6] Class counsel also argues that ending Davis's connection to the company was a great benefit to the class. It is unknown whether the class members who formerly or presently work for Aetna agree with that position. It is not a factor that is taken into account in accessing the fairness of the settlement. Another factor to consider is that, by settling, plaintiffs give up the possibility of obtaining a larger recovery as a result of an appeal. *Aetna III* calculates damages based on a value for ESOP stock that is significantly lower than the amount claimed by plaintiffs at trial. But even if there is a significant possibility of a successful appeal by plaintiffs on that issue, there would still be the problem of being able to collect a larger recovery.

Since the amount recovered as a result of the Second Settlement is close to or in excess of the amount recovered at trial; the Second Settlement avoids risks of collection and appeal, as well as some litigation costs; experienced and competent class counsel recommends the Second Settlement and no class member opposes it; and there being no indication of collusion, the Second Settlement is found to be fair,

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6. There is no clear information regarding whether the judgment would be collectible from Davis or Francione. From 1993 through 1997, Davis received dividend, salary, and bonus payments totaling close to $9 million. *See Aetna III*, 1998 WL 919754 at *12-13. No discovery, however, has been obtained regarding Davis's current assets and it has been represented that Davis has left the United States, with there being unconfirmed rumors that he has attempted to hide his assets outside the United States. No information is provided regarding Francione's ability to pay any judgment.

reasonable, and adequate. The Second Settlement will be approved as fair and the claims against Aetna, Davis, and Francione will be dismissed with prejudice.

As his fee, class counsel seeks one-third of all recoveries (including stock and sales proceeds and interest), with the one-third being calculated prior to any reduction by reimbursable expenses. The Rassin Group argues that an appropriate fee would be $816,039.88 based on the lodestar/multiplier method, or 20% if based on the percentage method.

Because the fees are to be paid out of a common fund, the rules applicable to common funds apply, not the fee-shifting provision of ERISA. *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir. 1994). The court essentially acts in the role of a fiduciary for the class, ensuring that any fees and expenses requested are not excessive. *Cook*, *supra*. Because the Rassin Group is represented by counsel who has provided competent opposition to class counsel's fee and expense requests, the need for vigilance by the court is diminished, but not eliminated. *Id.* While the fee request must be scrutinized to protect the class, class counsel is entitled to fair and reasonable compensation. Understandably, class members would prefer a complete recovery without any reduction for attorney fees or expenses. Counsel, however, has provided substantial services for which he deserves reasonable compensation. If not for the actions of the named plaintiff and counsel's vigorous and zealous representation, the class would likely have obtained no recovery whatsoever.

Appendix F

It is within the court's discretion to determine the appropriate method for calculating a fee award that is to be paid out of a common fund. *Cook*, 142 F.3d at 1012-13. The two most common methods employed are the percentage method and the lodestar/multiplier method. Some courts employ a "hybrid" method whereby both the lodestar amount and the percentage amount are considered in determining the appropriate amount to award. *Spicer v. Chicago Board of Options Exchange, Inc.*, 844 F. Supp. 1226, 1249-50 (N.D. Ill 1993). One of the advantages of the percentage method is administrative ease in that the tedious task of providing and examining lengthy and detailed billing records is avoided. *Davitt v. Information Resources, Inc.*, 1995 WL 234630 *2 (N.D. Ill. April 19, 1995). While the hybrid method has its appeal, it has the downside of requiring the detailed examination of billing records that cannot always be fully understood by the court. The percentage method will be employed, with an estimated lodestar being considered for comparison purposes. *See Davitt, supra*; *Harman v. Lyphomed, Inc.*, 787 F. Supp. 772, 775-76 (N.D. Ill. 1992).

Class counsel provides the declaration of Beverly Moore, Jr., the editor and publisher of Class Action Reports. Moore provides a summary of fees and costs awarded in 757 common fund cases. The awards have been based on both the percentage method and the lodestar/multiplier method. For all 757 cases, the fees and costs represented 19.6% of the recovery. For the 153 cases involving a recovery of $5-10 million, fees and costs represented an average of 29.5% of the recovery. For those cases recovering $10-20 million, the fees and costs represented an average of 25.8% of the recoveries. Moore does not provide any calculation regarding

the percentage represented by fees alone, separate from any cost or expense awards. Moore states that some awards are more than 40% and some are less than 5%. He does not specify the median award, which is probably a better comparison than the average given the wide range of fee awards. *Harman*, 787 F. Supp. at 775. This court's prior surveys of fee awards in securities fraud cases[7] disclosed that fee awards of 15-30% were common and that 25% was the median award in cases involving $5-15 million recoveries. *See id.* at 774-75; *Davitt*, 1995 WL 234630 at *2. *See also Spicer*, 844 F. Supp. at 1252-53 (most fee awards are 20-30%); *In re Nasdaq Market-Makers Antitrust Litigation*, 1998 WL 782020 *19 (S.D.N.Y. Nov. 9, 1998) (25% is median and benchmark for recoveries of $1-50 million); *Hanrahan v. Britt*, 174 F.R.D. 356, 368 (E.D. Pa. 1997) ("median award in a class action is approximately 25%").

In the present case, a few factors should be given particular consideration in determining the percentage to use. The amount of attorney time expended can be taken into consideration, with cases that settled early in discovery entitled to a lower percentage than those that did not settle until later. *See Davitt*, 1995 WL 234630 at *2; *Harman*, 787 F. Supp. at 774. Here, the case was not settled until after the trial. Moreover, until the tentative settlement was reached, defendants vigorously opposed plaintiffs at virtually every step. This is a factor favoring a higher percentage. Another factor favoring a higher percentage is that class counsel provided highly competent representation and produced a good recovery. Beyond the money recovery itself, counsel

7. Moore states in his declaration that his data suggest that fee awards do not vary significantly by type of case.

was able to design settlement terms that may contribute to the continuing economic vitality of Aetna, thereby protecting the jobs of many class members.

On the other hand, two factors favor a lower percentage. Throughout this case, class counsel has represented that defendants' liability (at least Aetna's and Davis's) was without doubt. As stated in *Aetna III*, 1998 WL 919754 at *27, "errors in the valuations and defendants' liability are clear." *See also id.* at *24. The actual amount of the undervaluation was not clear, but that there would be a recovery and that it would be substantial was always likely. There apparently were significant risks of not collecting the entire judgment depending upon the size of the recovery, but even if forced to file for bankruptcy, Aetna (and likely Davis) had assets and equity to pay a significant amount. Therefore, this was not a case where class counsel had a substantial risk of devoting extensive time and then receiving no fee whatsoever. The low level of risk is a factor favoring a lower percentage. *See Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1264 (D.C. Cir. 1993); *In re Harrah's Entertainment, Inc. Securities Litigation*, 1998 WL 832574 *6 (E.D. La. Nov. 25, 1998); *Goldenberg v. Marriott PLP Corp.*, __ F. Supp. 2d __, 1998 WL 956240 *4 (D. Md. Oct. 22, 1998). Also favoring a lower percentage is the fact that the recovery is large; even a percentage on the low end of the range would represent a substantial fee. *See Harrah's*, 1998 WL 832574 at *6 ($6.8 million recovery); *Davitt*, 1995 WL 234630 at *2 ($12.5 million recovery).

These factors essentially balance each other off. Because the percentage is being applied to a large fund, counsel will

be adequately compensated for the amount of work performed. The quality of the work and recovery does not call for any greater increase than the lack of risk calls for a decrease. Therefore, the percentage to be used will be 25%. *Cf. Harrah's*, 1998 WL 832574 at *4-6.

As to the cash settlements that were placed in escrow, class counsel will be entitled to 25% of those payments, including any interest that has accumulated in the escrow account. Of course, the remaining disbursement to class counsel must be reduced by the $500,000 in interim payments that class counsel has already received. Also, class counsel's share of the interest must be appropriately adjusted to take into account the fact that he has already received some payments. Because a separate reimbursement of expenses is being made and because the class's actual recovery is the net figure realized after expenses, the 25% is to be applied to the cash settlement after it has been reduced by the expense reimbursement. Because 25% of the net cash settlement is already a substantial amount, counsel will not be awarded any percentage of the stock that the class receives under the terms of the settlement. To the extent the class might become entitled to a percentage of sales proceeds under the terms of the settlement, class counsel will be entitled to 25% of any such proceeds as long as he continues to represent the class regarding that matter.

Ignoring the interest, the $6,900,000 cash settlement less $279,289.15 in expenses (a figure arrived at later in this opinion) results in a net recovery of $6,620,710.85. 25% of the net recovery is $1,655,177.71.

Appendix F

Class counsel contends that the lodestar for his firm's work is $1,265,795.50 representing 4,650.04 hours of time. The Rassin Group argues that an appropriate lodestar is $466,308.50 based on 2,818.70 hours of time. The correct amount is probably somewhere in between. Time will not be taken to examine the individual hours, but a rough estimate will be made by determining appropriate hourly rates and applying them to the range of hours claimed by the two sides.

Lead counsel claims a rate of $450 per hour and the Rassin Group contends it should be $280 per hour. Lead counsel is experienced and well qualified. If he were acting in a largely supervisory role, the $450 rate might be appropriate. His time, however, represents more than one-third of the time claimed. He was not functioning merely as a supervisor of the litigation. $350 is an appropriate rate for his time. For making the rough estimate, all the associate time will be calculated at $200 per hour, a reasonable rate for mid-level associates. The clerks' time will be calculated at $65 per hour. Applying these rates to the time submitted by class counsel, the lodestar is: (a) 1433.73 x $350; (b) 2701.61 x $200; and (c) 514.70 x $65 for a total of $1,075,583.00. Applying these rates to the time the Rassin Group contends is appropriate, the lodestar is: (a) 912.15 x $350; (b) 1469.15 x $200; and (c) 437.40 x $65 for a total of $641,513.50. A rough estimate of the lodestar is $700,000 to $1,000,000.

As the Rassin Group concedes, when using the lodestar approach in a common fund case, it is also appropriate to apply a multiplier. *Cook*, 142 F.3d at 1014; *Florin*, 34 F.3d at 564. Class counsel does not suggest a multiplier. Citing

Harman, 787 F. Supp. at 778, the Rassin Group suggests 1.75 as a multiplier. Subsequent to *Harman*, however, the Seventh Circuit has made clear that the facts of the particular case should be examined in order to determine the amount of risk and an appropriate multiplier. *See, e.g.*, *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245 (7th Cir. 1995). Here, the risk of no recovery was low, but there was some risk of a less than full recovery. A multiplier of 1.25 or 1.5 may be more appropriate than 1.75. *Cf. id.*

$700,000 with a 1.25 and 1.75 multiplier is, respectively, $875,000 and $1,225,000. $1,000,000 with a 1.25 and 1.75 multiplier is, respectively, $1,250,000 and $1,750,000. Therefore, the estimated range under the lodestar/multiplier approach would be $875,000 to $1,750,000. Most likely, the fees to be awarded under the lodestar/multiplier method would be between $1,000,000 and $1,500,000. This is less than the approximately $1.7 million awarded under the percentage method. It is common for the percentage method to result in a higher fee than the lodestar method, *Harman*, 787 F. Supp. at 775, and it certainly is not expected that the lodestar and percentage methods will usually produce identical results. *Cook*, 142 F.3d at 1013. The point of the rough comparison is to ensure that the percentage method does not produce either an extremely low or extremely high result. *See id.* Here, the two numbers are close enough to provide additional confirmation that 25% is a reasonable percentage to use. *Cf. Harman*, 787 F. Supp. at 778.

Next to be determined is the amount of expense reimbursement. Class counsel requests $363,345.82 of expense reimbursements. The Rassin Group objects to

$83,956.67 of the expenses claimed. They object that (a) certain expenses should be subsumed in overhead, *see Spicer*, 844 F. Supp. at 1257, 1260, 1262; *Davitt*, 1995 WL 234630 at *5; (b) photocopying expenses are inadequately documented and may be overcharged because the number of pages reproduced is not shown, *see Spicer*, 844 F. Supp. at 1260 (limiting photocopy charges to actual costs estimated at $.10 per page); *Davitt*, 1995 WL 234630 at *5; and (c) electronic research charges are excessive and should be cut in half. Class counsel does not provide any response to these objections other than conclusory name calling. *See* Class Counsel Response to Objections by Class Members at 11. Since class counsel presents no adequate argument, the objections will be upheld. Class counsel will be awarded $279,289.15 in expense reimbursements.

The last issue to resolve is named plaintiff's request for a $30,000 incentive award. At the second fairness hearing, the court raised a question as to whether the class was provided with adequate notice of named plaintiff's request for an incentive award. The notice of the fairness hearing only mentions the incentive award in passing by noting that the actual recovery of the class "may be . . . reduced by the requested attorneys fees, costs, expenses, and an incentive award to the named plaintiff." The notice does not specify the amount of the incentive award nor does it specify that objections could be raised to the incentive award. *Compare In re Residential Doors Antitrust Litigation*, 1998 WL 151804 *5 (E.D. Pa. April 2, 1998) (class was notified of the request for an incentive award and the amount requested); *In re Intelligent Electronics, Inc. Securities Litigation*, 1997 WL 786984 *1 (E.D. Pa. Nov. 26, 1997) (same); *In re*

Sapiens Securities Litigation, 1996 WL 689360 *2 (S.D.N.Y. Nov. 27, 1996). In response to the court's questions, class counsel represented that he would pay an incentive award out of his fee if the incentive award was deemed to have been waived for inadequate notice.

As indicated by the above cases and others that are not listed, a request for an incentive award often is mentioned in the fairness hearing notice sent to a class. No case, however, has been found that addresses the question of whether such notice is mandatory. Resolving that issue can be avoided, though, because there is also another problem with the request. As part of the original fee petition, class counsel made an argument regarding the incentive award. That petition and all other pending motions, though, were denied as moot when the Second Settlement was tentatively approved and counsel was directed to submit a new application for fees. *See* Order dated Dec. 17, 1998 (Docket Entry 365). The new fee petition requests the incentive award in its prayer, but there is no mention and certainly no discussion of the incentive award in the text of the petition. The Rassin Group did object to a fee award and class counsel inserts a reply argument[8] in his response to objections submitted a few days before the second fairness hearing.

In light of the failure to make an adequate argument, the possibly insufficient notice, and class counsel's offer to pay

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8. The "argument" largely consists of invectives against the Rassin Group, cites no legal authority, and makes no attempt to explain why $30,000 would be the appropriate amount for an incentive award.

an incentive award out of his fees, no separate incentive award will be made. The fees paid to counsel are sufficient to cover an incentive award as well.

IT IS THEREFORE ORDERED that the two settlements reached with the defendants in this case are found to be fair, adequate, and reasonable and are approved. Class counsel's petition for attorney fees [372] is granted in part and denied in part. Plaintiffs' cause of action is dismissed with prejudice. Class counsel is awarded $279,289.15 in expense reimbursements to be paid out of the class settlement fund. As attorney fees in this action, class counsel is awarded 25% of the class's net cash recovery (including interest) and 25% of any net recovery of sales proceeds. No further disbursement of funds may be made to class counsel until the time for appealing today's order has expired. This court retains jurisdiction to enforce the terms of the settlements and to resolve any disputes regarding distributions of the settlement proceeds. On April 30, 1999, class counsel shall file a report regarding distributions that have been made from the escrow accounts and the status of any funds still remaining in the escrow accounts.

ENTER:

s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: MARCH 16, 1999

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Clinton A. Krislov
Krislov & Associates, Ltd.
222 North LaSalle Street
Suite 2120
Chicago, IL 60601-1086

Case Number: 1:95-cv-03193

Title: Montgomery v. Aetna Plywood Inc
Assigned Judge: Honorable William T. Hart

MINUTE ORDER of 3/16/99 by Hon. William T. Hart : The settlements in this case are found to be fair, adequate, and reasonable and are approved. Fee petition [372-1] granted in part and denied in part. Plaintiffs' cause of action dismissed with prejudice. Class counsel awarded $279,289.15 in expense reimbursements to be paid out of the class settlement. Class counsel awarded fees representing 25 per cent of net cash recovery (including interest) and 25 per cent of any net recovery of sales proceeds. No further disbursement of funds may be made to class counsel until the time for appeal has expired. This court retains jurisdiction to enforce the terms of the settlements. On 4/30/99, class counsel shall file a report of distributions. terminating case Mailed notice

This docket entry was made by the Clerk on March 18, 1999

* * *

Appendix F

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge **WILLIAM T. HART**

* * *

CASE NUMBER **95 C 3193**

DATE **MARCH 16, 1999**

CASE TITLE **HOWARD MONTGOMERY, etc., et al. v. AETNA PLYWOOD, etc., et al.**

* * *

DOCKET ENTRY:

* * *

(10) ■ [Other docket entry] The settlements in this case are found to be fair, adequate, and reasonable and are approved. Fee petition [372] granted in part and denied in part. Plaintiffs' cause of action dismissed with prejudice. Class counsel awarded $279,289.15 in expense reimbursements to be paid out of the class settlement. Class counsel awarded fees representing 25% of net cash recovery (including interest) and 25% of any net recovery of sales proceeds. No further disbursement of funds may be made to class counsel until the time for appeal has

expired. This court retains jurisdiction to enforce the terms of the settlements. On April 30, 1999, class counsel shall file a report of distributions.

(11) ■ [For further detail see order attached to the original minute order.]

* * * *

APPENDIX G — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED DECEMBER 17, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins — Office of the Clerk
CLERK

Clinton A. Krislov
Krislov & Associates, Ltd.
222 North LaSalle Street
Suite 2120
Chicago, IL 60601-1086

Case Number: 1:95-cv-03193

Title: Montgomery v. Aetna Plywood Inc
Assigned Judge: Honorable William T. Hart

MINUTE ORDER of 12/17/98 by Hon. William T. Hart : Settlement agreement and joint motion to preliminarily approve settlement is granted. [362-1] Class counsel's motion of additional interim award of attorneys fees, in addition to interim fees previously allowed, is granted. [363-1] Agreed order entered as to interim fees. All other pending motions are hereby denied without prejudice as being moot. [360-1], [356-1], [338-1], [338-2], [309-1], [309-2], [308-1], [308-2], [308-3] Plaintiffs counsel to re-file new application for attorneys fees. Mailed notice

This docket entry was made by the Clerk on December 17, 1998

* * * *

APPENDIX H — AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 16, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 3193

HOWARD R. MONTGOMERY, for himself and for all others similarly situated for themselves and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan, Nominal Defendant,

Plaintiffs,

v.

AETNA PLYWOOD, INC., a Delaware corporation, JEFFREY DAVIS, JOHN FRANCIONE, PETER C. JOHN, and PETER THOMSEN, Defendants.

July 16, 1998

* * *

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appendix H

HART, District Judge.

Following a bench trial, findings of fact and conclusions of law dated June 11, 1998 were issued. After issuance of the findings, the parties revealed that, during trial, defendants Peter John and Peter Thomsen had reached a settlement with the plaintiff class whereby they agreed to pay $800,000 to settle the claims against them. John and Thomsen are to pay this amount regardless of the outcome of the trial. The only contingency being that, because this is a class action, the settlement has to be approved by the court following notice to the class. The parties agreed that the existence of the settlement was not to be disclosed to the court until after findings of fact and conclusions of law had been issued. After the settlement had been reached, the parties continued to participate in the trial as if no settlement had occurred.

Because a settlement of a class action remains tentative until final approval by the court, the claims against John and Thomsen did not become moot upon the signing of the settlement agreement and this court did not lose jurisdiction to decide the case. Nevertheless, the need for entering findings and conclusions on the merits ceased absent disapproval of the settlement. Although John and Thomsen urge the court to leave the findings fully intact and enter judgment on them, that would be an inappropriate action. Since signing the settlement, the parties' common interest was in having the settlement approved. It was inappropriate to keep the settlement secret. The parties no longer being in a fully adversarial relationship, findings are no longer appropriate. Even if the findings were to remain untouched, no judgment could be entered on them since the only

judgment that can now be entered (absent disapproval of the settlement) is a judgment based on the settlement.

The findings and conclusions that follow replace the now vacated June 11, 1998 findings and conclusions. Those findings and conclusions that were pertinent only to John and Thomsen have been eliminated. The findings also add additional information that has been provided enabling the court to calculate damages and prejudgment interest through July 16, 1998.

I. Introduction

This case is before the court after a bench trial for entry of findings of fact, conclusions of law and final judgment. Plaintiff Howard R. Montgomery brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, on his own behalf and on behalf of former participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP"). Jurisdiction is not contested. Federal courts have exclusive jurisdiction over actions brought pursuant to ERISA. Supplemental jurisdiction exists with respect to a state law corporate fiduciary claim.

Named plaintiff claims that the individual defendants are ESOP fiduciaries by virtue of being members of an ESOP committee, as well as officers and the directors of Aetna Plywood, Inc. ("Aetna" or the "Company"). Named plaintiff alleges that, in a leveraged buy-out at an undervalued price of $85.75 per share, defendants sold to the Company the controlling block of Aetna stock held by the ESOP.

Appendix H

A class was certified consisting of "[a]ll participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan as of the June 1992 sale of the ESOP's shares of Aetna Plywood, Inc. to Aetna Plywood, Inc., excluding all defendants." Montgomery v. Aetna Plywood, Inc., 1996 WL 189347 *6 (N.D.Ill. April 16, 1996) ("Montgomery I"), *reconsideration denied,* 1996 WL 189347 *2 (N.D.Ill. April 16, 1996).

Leave to amend was granted to add a stockholder fiduciary claim under Delaware law against defendants in their separate capacity as Aetna directors. *See* Montgomery v. Aetna Plywood, Inc., 956 F.Supp. 781, 787-88 (N.D.Ill.1997) ("Montgomery III"). The state law corporate claim, which is not based on defendants' ERISA fiduciary status, is not preempted by ERISA. Boston Children's Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429, 439-40 (1st Cir.1996); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1468 (5th Cir.1986), *cert. denied,* 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987).

Leave to add a federal securities law claim was denied for want of standing, Montgomery I, 1996 WL 189347 at *2; a state law unjust enrichment claim (Count III of the first amended complaint) was dismissed as preempted by ERISA, Order dated Sept. 7, 1995; defendants' motion for summary judgment on statute of limitations grounds was denied, Montgomery III, 956 F.Supp. at 785-86; and plaintiffs' motion for summary judgment as to liability was denied, Order dated April 29, 1997.

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Count I of the third amended complaint alleges a violation of 29 U.S.C. § 1104(a)(1) which requires that an ERISA fiduciary discharge his or her duties of loyalty in a prudent manner for the exclusive purpose of providing benefits to the ESOP participants. Named plaintiff claims that the purpose of the stock transaction was not for the benefit of the ESOP stockholders, but rather was to reacquire the ESOP shares in order to vest sole control and ownership of the Company in defendant Davis at a price below market value. Named plaintiff also alleges that the price paid was based on a flawed valuation of the ESOP shares.

Count II of the third amended complaint alleges a violation of 29 U.S.C. § 1106 which prohibits self-dealing by ERISA fiduciaries. At the time of the transaction, all but 17 shares of Aetna were held by the ESOP. Defendant Jeffrey Davis, the president and a director of Aetna and a member of the ESOP committee, owned these remaining shares and became the sole owner of Aetna upon repurchase of the ESOP stock by the Company. However, the *per se* rules that prohibit fiduciary self-dealing are not applicable to all aspects of ESOP administration. There is a conditional exemption for the acquisition of employer securities if it is shown that the purchase was made for "adequate consideration." 29 U.S.C. § 1108(e). The parties agree that this exception provides an affirmative defense to what would otherwise be a prohibited transaction, but the burden shifts to the fiduciaries to prove that adequate consideration was paid. *See* Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir.1996), *cert. denied,* 520 U.S. 1237, 117 S.Ct. 1838, 137 L.Ed.2d 1042 (1997). It must be shown that they arrived at their determination of adequate consideration in good faith by way of a prudent investigation

and the application of sound business principles of evaluation. Donovan v. Cunningham, 716 F.2d 1455, 1467-68 (5th Cir.1983), *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984).

Count IV of the third amended complaint alleges that, because the defendant directors and officers are on both sides of the stock sale transaction, they are required, under applicable Delaware law, to demonstrate, under a test of careful scrutiny, their utmost good faith and the inherent fairness of the bargain to the shareholders whose interests were purchased. Named plaintiff alleges that the stock transaction cannot pass such a test. Defendants admit that they carry the burden of proof with respect to Count IV.

ERISA provides that the term "adequate consideration" means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." 29 U.S.C. § 1002(18)(B).

The Secretary has issued a proposed defining regulation, Proposed Regulation Relating to the Definition of Adequate Consideration, 53 Fed.Reg. 17632 (to be codified at 29 C.F.R. § 2510.3-18) (proposed May 17, 1988) ("Proposed Regulation").[1] The Proposed Regulation incorporates

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1. Although the proposed regulation has not been formally adopted, the experts for both sides have acknowledged that it is widely considered and followed. It is referred to in the experts' reports, in the testimony of the experts and in a valuation treatise

(Cont'd)

applicable statutory and trust law standards and furnishes a useful paradigm for asset valuation and analysis. Pertinent parts of the Proposed Regulation are as follows:

> (2) **Fair Market Value.** (i) Except as otherwise specified in this section, the term "fair market value" as used in section 3(18)(B) of the Act . . . means the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well informed about the asset and the market for such asset.
>
> (ii) The fair market value of an asset for the purposes of section 3(18)(B) of the Act . . . must be determined as of the date of the transaction involving that asset.
>
> (iii) The fair market value of an asset for the purposes of section 3(18)(B) of the Act . . . must be reflected in written documentation of valuation meeting the requirements set forth in paragraph (b)(4), of this section.

(Cont'd)
accepted by defendants' expert as authoritative. *See* James H. Zukin, *Financial Valuation: Business and Business Interests* § 8.2 (1990). *See, e.g.*, Scott v. Evins, 802 F.Supp. 411, 415 (N.D.Ala.1992), *aff'd by unpublished order*, 998 F.2d 1022 (11th Cir.1993).

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(3) **Good Faith** — (i) **General Rule.** The requirement in section 3(18)(B) of the Act . . . that the fiduciary must determine fair market value in good faith establishes an objective, rather than a subjective, standard of conduct. Subject to the conditions in paragraphs (b)(3), (ii) and (iii) of this section, an assessment of whether the fiduciary has acted in good faith will be made in light of all relevant facts and circumstances.

(ii) In considering all relevant facts and circumstances, the Department will not view a fiduciary as having acted in good faith unless

(A) The fiduciary has arrived at a determination of fair market value by way of a prudent investigation of circumstances prevailing at the time of the valuation, and the application of sound business principles of evaluation; and

(B) The fiduciary making the valuation either,

(1) Is independent of all parties to the transaction (other than the plan), or

(2) Relies on the report of an appraiser who is independent of all parties to the transaction (other than the plan).

(iii) In order to satisfy the independence requirement of paragraph (b)(3)(ii)(B), of this section, a person must in fact be independent of all parties (other than the plan) participating in the transaction. For the purposes of this section, an assessment of independence will be made in light of all relevant facts and circumstances. However, a person will not be considered to be independent of all parties to the transaction if that person —

(1) Is directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with any of the parties to the transaction (other than the plan);

(2) Is an officer, director, partner, employee, employer or relative (as defined in section 3(15) of the Act, and including siblings) of any such parties (other than the plan);

(3) Is a corporation or partnership of which any such party (other than the plan) is an officer, director or partner.

For the purposes of this subparagraph, the term "control," in connection with a person other than an individual, means the power to exercise a controlling influence over the management or policies of that person.

(4) **Valuation Content.** (i) In order to comply with the requirement in paragraph (b)(2)(iii), of this section, that the determination of fair market value be reflected in written documentation of valuation, such written documentation must contain, at a minimum, the following information:

(A) A summary of the qualifications to evaluate assets of the type being valued of the person or persons making the valuation;

(B) A statement of the asset's value, a statement of the methods used in determining that value, and the reasons for the valuation in light of those methods;

(C) A full description of the asset being valued;

(D) The factors taken into account in making the valuation, including any restrictions, understandings, agreements or obligations limiting the use or disposition of the property;

(E) The purpose for which the valuation was made;

(F) The relevance or significance accorded to the valuation methodologies taken into account;

(G) The effective date of the valuation; and

(H) In cases where a valuation report has been prepared, the signature of the person making the valuation and the date the report was signed.

(ii) **Special Rule.** When the asset being valued is a security other than a security covered by section 3(18)(A) of the Act . . ., the written valuation required by paragraph (b)(2)(iii) of this section, must

contain the information required in paragraph (b)(4)(i) of this section, and must include, in addition to an assessment of all other relevant factors, an assessment of the factors listed below:

(A) The nature of the business and the history of the enterprise from its inception;

(B) The economic outlook in general, and the condition and outlook of the specific industry in particular;

(C) The book value of the securities and the financial condition of the business;

(D) The earning capacity of the company;

(E) The dividend-paying capacity of the company;

(F) Whether or not the enterprise has goodwill or other intangible value;

(G) The market price of securities of corporations engaged in the same or a similar line of

business, which are actively traded in a free and open market, either on an exchange or over-the-counter;

(H) The marketability, or lack thereof, of the securities. Where the plan is the purchaser of securities that are subject to "put" rights and such rights are taken into account in reducing the discount for lack of marketability, such assessment shall include consideration of the extent to which such rights are enforceable, as well as the company's ability to meet its obligations with respect to the "put" rights (taking into account the company's financial strength and liquidity);

(I) Whether or not the seller would be able to obtain a control premium from an unrelated third party with regard to the block of securities being valued, provided that in cases where a control premium is taken into account:

(1) Actual control (both in form and in substance)

is passed to the purchaser with the sale, or will be passed to the purchaser within a reasonable time pursuant to a binding agreement in effect at the time of the sale, and

(2) It is reasonable to assume that the purchaser's control will not be dissipated within a short period of time subsequent to acquisition.

* * * * * *

II. FINDINGS OF FACT

Based on the testimony, exhibits and depositions presented at trial, and post-trial filings as to damages and prejudgment interest, the court finds the facts to be as follows:

1. ESOPs, such as the Aetna ESOP created in this case, are qualified profit-sharing plans under the Internal Revenue Code and ERISA formed to hold an employer's common stock. Employees thereby participate in the risk, benefits, growth and success of the enterprise. The administration of the Aetna ESOP is by a committee composed of individuals appointed by the board of directors of the Company. Under a written plan, an ESOP trust estate was established to acquire and purchase stock from Aetna and its controlling

stockholders upon financing guaranteed by the Company. As the loan is paid by dividends or contributions, shares are allocated to employee accounts, which grow tax- deferred to the employees' retirement. Special income averaging and "rollover" provisions are available to minimize tax upon distribution from the ESOP.

2. There are significant tax incentives and estate planning advantages available to induce employers and controlling stockholders to establish and fund ESOPs. Employer contributions to an ESOP are tax deductible to the employer. If a corporation uses an ESOP to obtain a loan, it will be entitled to take tax deductions with respect to both the interest and the principal payments on the loan instead of deducting the interest only. An institutional lender may exclude from its taxable income 50% of the interest received on a loan to an ESOP that owns 50% or more of the stock of the sponsoring employer, with the result that the interest rates on loans to such ESOPs are usually lower than on other commercial loans. Dividends paid in cash on shares held by an ESOP will be deductible if passed through to participants in the plan or if used to pay off a loan taken out by the ESOP to finance the purchase of company stock.

3. Controlling stockholders may sell their stock to an ESOP (as did the founders of Aetna) and defer any gain on the sale by reinvesting in another domestic corporation if the ESOP owns at least 30% of the sponsoring company after the sale (as it did in this case). As employees and officers of the Company, selling stockholders may also (as they did in this case) acquire interests in the ESOP along with other employees.

4. Employees who have a vested interest in ESOP shares may take those shares with them upon terminating their employment. Upon retirement, employees of a privately owned company have an option to "put" their shares back to a company and require a company to redeem the shares at their fair market value paid over a period of five years.

5. ESOPs are required by law to issue an annual valuation of a company's shares. The annual valuation is also used by a company to purchase the retiring employee shares "put" to the company.

6. Plaintiff Howard R. Montgomery is a vested participant in the Aetna Plywood, Inc. Profit Sharing Plan, the successor by merger to the ESOP, and was a vested participant in the ESOP at the time of the sale of the ESOP's Aetna shares. He brings this action individually, and as a class representative on behalf of all vested members of the ESOP at the time of the sale. Defendant Aetna Plywood, Inc. Profit Sharing Plan is the successor by merger to the rights of the ESOP, the assets of which were merged into the Profit Sharing Plan after the stock transaction.

7. Defendant Aetna, a Delaware corporation, is a wholesaler of plywood and wood veneers. Aetna also sells particle board and various filler boards used in furniture and interior construction. In addition to wood products, Aetna is engaged in the wholesaling of plastic laminate material. Aetna's customers are principally large scale furniture and fixture manufacturers in Chicago. Aetna has recently entered the Columbus, Dayton and Cincinnati markets.

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8. The Company was begun as a partnership of Don L. Davis and Arthur Schwanke in 1937. The business was incorporated in 1946. The ESOP was created in October of 1978. In the 1980's, the Schwanke and Davis families sold substantial blocks of stock to the ESOP. The ESOP committee was composed of members of the Aetna board of directors, some of whom were also officers of Aetna.

9. As of June 12, 1992, the date the stock transaction closed, Aetna's common stock consisted of 100,000 shares authorized, of which 84,411 shares were issued and outstanding and 15,489 were treasury shares which had been acquired by the Company from ESOP participants.

10. Defendant Jeffery G. Davis ("Davis"), grandson of one of the founders, joined the Company in 1985. At the time of the 1992 repurchase of the ESOP shares, Davis was president of Aetna, a member of the board of directors, and a member of the ESOP committee. Shortly before the 1992 repurchase, Davis received by gift from his mother, her interest in 4,535 Aetna shares. Davis received cash for these shares at or before the time of the 1992 repurchase. Davis also had an ESOP participation in other shares of the Company in his own name. After the 1992 repurchase, there were only 17 shares of Aetna stock outstanding that had not been acquired by Aetna. Those 17 shares were owned by Davis. As a result of the 1992 stock transactions, which were financed entirely by Company funds and company borrowings, Davis became the sole owner of the Company.

11. Davis is a well-educated (B.A. Michigan 1965, M.B.A. Harvard 1967) and experienced businessperson. Prior

to joining Aetna in 1985, he worked for a number of large corporations and the business consulting firm of Booze, Allen & Hamilton.

12. Defendant John Francione ("Francione") was chief financial officer and a director of Aetna at the time of the sale. Francione has a degree in accounting and for seven years was an auditor with the accounting firm of Peat Marwick & Mitchell. He joined Aetna as its controller in 1966. From 1971 until July 9, 1992, he served as a member of the board of directors. He also served as a member of the ESOP committee. Francione held more than 5,000 Aetna shares in the ESOP at the time of the 1992 sale. Since retiring in 1994, Francione has received $380,000 from Aetna in consulting fees through the year 1997.

13. Defendant Peter C. John ("John") served as a director of Aetna and a member of the ESOP Committee from January 3, 1989 until July 9, 1992. Defendant Peter Thomsen ("Thomsen") joined the Aetna board on October 25, 1989. He was appointed to the ESOP committee on January 11, 1991. On July 9, 1992, after the stock sale transaction, Thomsen resigned from the Aetna board and the ESOP Committee.

14. During the trial of this case, John and Thomsen reached a settlement with the class that was subsequently memorialized in a letter agreement dated February 9, 1998. A fairness hearing as to approval of the settlement is set for September 3, 1998.

15. For many years, Aetna engaged SCS Management ("SCS"), headed by Oliver Turner ("Turner"), to prepare the

required annual valuation of Aetna stock held by the ESOP. Throughout this period, Turner also gave advice to Davis and his father concerning the subject of Davis's control of the Company after the passing of his father. On March 16, 1987, Turner advised Davis to buy shares that his father took as distributions from the ESOP saying: "These shares in themself [sic], will not give you a great deal of percentage ownership, but it could mean a lot as the only owner outside of the ESOP."

16. Turner's valuations were used to fix the price for "put" transactions in which Aetna bought shares from retiring ESOP participants. Turner's valuations were essentially based on the per share book value of the stock, less deductions to represent the lower value of a minority stock interest and the effect of "put rights." Low or conservative annual valuations required the least expenditure by the Company, when purchasing the stock of retiring employees.

17. In March of 1991, Francione sent a memo to the directors expressing his concern regarding Aetna's estimated "put" liability over a five-year period. On June 10, 1991, he sent another memo to the board recommending redemption of a portion of the ESOP shares. The memo states:

> In nutshell we have approximately $3,000,000 in excess cash at present. Our line of credit at Lake Shore could produce another $4,000,000. Therefore we could make available $7,000,000 in cash. We are committed to $900,000 for a new office building.

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The Aetna board, at the request of defendant John, directed that the Company engage the accounting firm of Deloitte & Touche to make an estimate of the Company's "put" liability. The Deloitte & Touche study estimated the repurchase liability over a number of years. The cumulative payment obligation was estimated to be approximately $1.6 million through a five-year period ending 1996. The obligation was well within Aetna's financial capability and did not then or thereafter require that Aetna take steps to eliminate its ESOP.

18. At the December 18, 1991 meeting of the Aetna board, the issue of a buy-back of the ESOP Aetna shares was again discussed. It was agreed that Davis would obtain a written statement of the procedure for a buy-back program for the Aetna stock held by the ESOP and would obtain an opinion of alternatives and cost. It was also decided to seek outside legal advice concerning the options available to the Company.

19. At the December 1991 meeting, Davis reported to the board that the effect of the resignation of George Bryson, the vice-president in charge of sales, was "minimal" and a "non-issue."

20. On January 7, 1992, Turner wrote to Davis regarding financing for the Company's purchase of its stock from the ESOP. Turner proposed that he be retained by the Company and its board of directors to acquire the stock from the ESOP. His fee proposal included the suggestion that he arrange for financing and be allowed a percentage commission on the financing provided to Aetna.[2]

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2. The ERISA statute prohibits any commission in transactions involving an employer's stock. 29 U.S.C. § 1108(e)(2). Davis apparently did not accept this aspect of the proposal.

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21. Attorney Kurt Schmeltzer was engaged by Davis and the Company to render legal advice concerning a possible purchase of ESOP shares by the Company. In a written opinion dated January 17, 1992, the board was advised, in part, as follows:

> Although there are a number of issues that need to be discussed in connection with this transaction, of paramount importance is the purchase price to be set for the ESOP equity that is to be purchased by the company. An ESOP fiduciary (most likely the trustee) faced with the choice of whether to sell the ESOP stock must determine that the price of the sale is "prudent" within the meaning of Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974. The fiduciary also must make its decision in a manner which is for the exclusive benefit of the ESOP participants and their beneficiaries. The question of fiduciary prudence in the context of purchasing and selling employer stock has been the subject of several cases. Generally, the cases hold that the determination of whether adequate consideration has been paid to the ESOP is itself a matter of fiduciary prudence, that the fiduciary need not become an expert in valuing the stock as long as it hires qualified advisors, and that the appraisal which is relied upon by the fiduciary to establish the price must be up to date as of the time of the purchase. Simply put, the ESOP fiduciary, in carrying out its fiduciary duties in a transaction of this type would have to insist on

> the issuance of a fairness opinion from an independent valuation firm. Obviously your ability to terminate the plan and fully redeem all stock depends on the valuation since I assume that financing will only be available at certain price levels. Thus, the first and most important step to be taken if the board determines to terminate the ESOP and redeem stock, would be the receipt of a fairness opinion. Only then could the contemplated redemption take place and the plan be terminated.

22. Turner was employed by Davis and Francione on behalf of the Company to evaluate the ESOP stock value and to investigate the financing options available to Aetna. Turner's valuation opinions were rendered to Davis and to the Company, but not to the ESOP committee or to the independent ESOP committee members, John and Thomsen. Davis and Francione, with whom Turner dealt, had conflicts of interest because of their interests in the Company and in the transaction. There is no evidence that Turner ever conferred with, or reported separately to, John or Thomsen, the only fiduciaries without any interest in the transaction.

23. Turner was not independent of Davis or the Company. It was in the Company's and Davis's interest to acquire ESOP shares at the lowest possible price. Nevertheless, Turner's valuation was utilized by all the fiduciaries in fixing the price to be paid to the ESOP participants. On January 30, 1992, Davis wrote to Francione stating: "Per Ollie Turner $85.75 is the ESOP value. If you need any further info *do not* call Ollie. Call me in Indianapolis."

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24. On February 5, 1992, Turner issued a written opinion valuing the Aetna stock at $85.75 per share as of October 31, 1991. On May 13, 1992, Turner issued an updated opinion for the interim period ending April 30, 1992, based on financial performance for the twelve months ending April 30, 1992 (unaudited), valuing the stock at $85.00 per share. Other opinions were thereafter sought from Walter Zweifler ("Zweifler") of Zweifler Financial Research and Edward Cerar ("Cerar") of Corporate Valuation Specialists, Inc., to confirm the opinion expressed by Turner.

25. The minutes of the Aetna board and shareholders meeting held April 10, 1992 state, in part:

(a) Francione reported that March 1992 was the best month of the fiscal year; that gross profits had been increasing steadily over the last six weeks and that the Company was 10% ahead of the last year although expenses had increased.

(b) Turner made a presentation on the diversification of the ESOP.

(c) At the suggestion of John, and over the objection of Davis who thought it unnecessary, it was determined that the ESOP committee would send a letter to the ESOP participants seeking their views concerning sale of the Aetna stock held by the ESOP.

(d) Aetna had received commitments from three banks to provide financing of $7 to $8 million, allowing the redemption of all outstanding stock.

(e) The shareholders adopted a by-law restricting stock ownership to employees and the ESOP trustee.

26. A letter, dated April 24, 1992, was sent to the ESOP participants, informing them that the ESOP Committee believed it would be prudent to convert the Company stock in the ESOP to more diversified and liquid investments because it would "be more prudent for a retirement plan" to invest retirement funds in investments "with a proven track record for growth" and eliminate the risk of dependence on "the performance of the company."

27. The letter to the ESOP participants stated that the value of the Company stock at October 31, 1991 was $85.75 per share. A chart comparing the growth of a fund administered by the Lake Shore National Bank and the value of the Aetna stock in the ESOP between January 1, 1981 and the end of the year 1991 was attached to the letter. According to this chart the Lakeshore fund grew in value 530% while Aetna stock grew only 209%. However, the participants were not furnished with Aetna financial statements or told that the book value of the stock exceeded $140. Nor were they told that the Aetna stock valuation was based on the net book value, discounted 40% for lack of marketability and repurchase liability.

28. The ESOP participants were also told that, after the purchase of the ESOP stock by the Company, the common stock ownership would be "4500 shares held by the Davis family." John and Thomsen, the outside directors, were not informed that Davis would be the sole owner of the Company by virtue of his ownership of only 17 Aetna shares outstanding after the transaction.

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29. ESOPs, organized as they are with the purpose of holding an employer's securities, are specifically exempt by law from trust investment diversification standards with respect to employer securities. 29 U.S.C. § § 1104(a)(2), 1107(b)(1), 1107(d)(5) & (6). Moreover, the financial condition of Aetna in April of 1992 did not otherwise require or support the sale of the ESOP stock in order to minimize investor risk. Aetna was emerging, along with the economy in general, from the low part of a business cycle and had a very strong balance sheet. No other aspect of the Company's business, such as the resignation of the sales vice-president (which the board had been told was a non-issue) or the relative success of new branch offices, warranted the Company's purchase of the ESOP stock in order to minimize investor risk. Rather, the evidence shows that the actions taken by defendants Davis and Francione to acquire the ESOP stock were in furtherance of a plan to have Davis become the sole owner of the Company.

30. A special meeting of the Aetna board of directors was held on May 5, 1992 (before the issuance of either the Zweifler or Cerar opinions) to approve the ESOP purchase. Directors John and Thomsen were present by telephone. The following resolution was adopted:

> WHEREAS, the Board of Directors of this Corporation (the "Board") deems it to be in the best interests of the Corporation for the Corporation to purchase from the Aetna Plywood, Inc. Restated Employees Stock Option Plan (the "ESOP") all of the shares (the "ESOP Shares")

of capital stock of the Corporation presently owned by the ESOP, at a price per share not less than $85.75; and

WHEREAS, the ESOP is willing to sell the ESOP Shares to the Corporation at such price; and

WHEREAS, the Directors have further determined that it is in the best interests of the Corporation to finance the purchase price for the ESOP Shares with the proceeds of a loan (the "Loan") to the Corporation from Lake Shore Bank (the "Bank") secured by the inventory, accounts receivable, machinery and equipment and real property of the Corporation, on terms substantially as set forth in the Commitment Letter dated May 6, 1992 heretofore issued to the Corporation by the Bank (the "Commitment");

NOW, THEREFORE, BE IT RESOLVED, that this Corporation purchase from the ESOP, all the ESOP Shares, being 79,876 shares, at a purchase price per share not less than $85.75; and

FURTHER RESOLVED, that the Corporation obtain an appraisal of the value of the ESOP Shares from an independent party, in order to confirm that a price per share not less than $85.75 would be a fair price; and

FURTHER RESOLVED, that the President of the Corporation be, and he hereby is, authorized and

directed, upon receipt of such appraisal of the ESOP Shares, to establish the purchase price for such shares, consistent with these resolutions; and

FURTHER RESOLVED, that the Corporation accept the Commitment, and

FURTHER RESOLVED, that the Corporation borrow from the Bank, from time to time, up to $9.0 Million, on the terms and conditions set forth in the Commitment, or on such other terms and conditions as the President or Treasurer of the Corporation may approve; and

FURTHER RESOLVED, that, to the extent required by the Bank, the Corporation grant to the Bank a first security interest in the inventory, accounts receivable, machinery and equipment and real property of the Corporation to secure the Loan to the Corporation by the Bank, as more fully set forth in the Commitment; and

FURTHER RESOLVED, that any one of the President, any Vice-President, or the Treasurer of the Corporation be, and each of them hereby is, authorized and directed to execute, acknowledge (to the extent required) and deliver on behalf of the Corporation, any and all documents, including but not limited to a loan and security agreement and one or more promissory notes and any and all documents required thereunder, which may be necessary or which any

> of them may deem advisable to consummate the purchase of the ESOP Shares, the borrowings from the Bank pursuant to the Commitment and any and all other transactions contemplated thereby or hereby or incidental thereto or hereto.

(Emphasis supplied.)

31. On May 6, 1992, the Lake Shore National Bank issued a written financing commitment totaling $9,500,000 for the ESOP stock acquisition and the construction of a new 30,000 square foot Aetna office building in Lake Zurich, Illinois. In connection with the financing commitment, Aetna's historic and estimated future sales were contained in the bank proposal. Audited sales for the 12 months ending October 31, 1991, were $54,084,000. Estimated sales, pro forma for twelve months ending October 31, 1992, were $58,000,000, consistent with the upward sales trend reported to the board in March of 1992. (Actual sales for twelve months ending October 31, 1992 were $60,347,505.) The financing proposal was accepted by Davis on May 8, 1992.

32. Zweifler issued an appraisal valuing the Aetna shares at $85.00 per share as of June 1, 1992. Zweifler was referred to Davis by Turner and retained by Davis to perform the valuation. His report was based, in part, on information provided at meetings with Davis and Francione. There is no evidence that Zweifler ever held any personal meetings with John or Thomsen either before or after submitting his valuation opinion.

33. On June 8, 1992, Cerar issued a written opinion stating that the price of $85.00 per share was, from a financial

point of view, fair to the ESOP. Unlike the Turner and Zweifler reports, the Cerar opinion letter contains no analysis or reasons explaining why he agreed that the $85.00 price was fair to the ESOP holders. There is no evidence that Cerar ever met with the independent ESOP committee members.

34. Although the issue of adequate consideration is not to be determined by events after a sale, the details of the stock and financial transactions of Aetna and the defendants at the time of, and subsequent to, the ESOP stock transaction are relevant to the prudence of the investigation, the fairness of the transaction to the ESOP participants and the specific nature of the conflict of interest of the defendants. All the actual benefits to the buyer and the known prospects of the Company are properly considered for the purpose of determining whether or not fair market value was paid.

35. According to the audited financial statements for the fiscal year ending October 31, 1992, on June 12, 1992 Aetna purchased 79,876 shares of outstanding stock from the ESOP for $6,849,367. Also, during the year the Company acquired 8,719 shares from separating ESOP participants for $747,654. This included shares held by Davis or his family. The Company retired a total of 99,983 shares of treasury stock leaving only 17 shares held by Davis outstanding. Davis caused these shares to be split into 100,000 shares. Aetna, or Davis, then elected to be taxed under the provisions of Subchapter S of the Internal Revenue Code for the years beginning after October 31, 1992. Pursuant to the election, earnings are taxed at the stockholder level, and company distributions are made to the stockholder to pay income taxes attributable to company earnings.

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36. In addition to the amounts expended on stock acquisitions during the fiscal year ending October 31, 1992, Aetna spent $650,000 on construction of the new office building. Substantial portions of the amounts expended came from cash on hand. Short term bank borrowings at fiscal year end 1992 were $4,650,000 from the revolving lines of credit and no funds had been drawn on the general term loan commitment.

37. During 1993, Aetna incurred $489,050 of additional building construction costs. Upon completion of the building, title was transferred to Davis in exchange for a note receivable in the amount of $1,140,000. The building was leased to the Company by Davis for a monthly rental of $8,000.

38. In the years prior to the stock purchase from the ESOP, Aetna did not pay dividends on its common stock. In the five years following the purchase, Davis, as sole shareholder, received the following dividends:

1993:	$ 571,320
1994:	$3,458,308
1995:	$1,268,872
1996:	$ 370,627
1997:	$1,389,580
TOTAL	$7,058,707

Aetna's dividend paying capacity was not addressed in the Turner, Zweifler or Cerar valuation studies or in the testimony of defendants' expert.

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39. In addition to the dividends paid, Davis's salary and bonus compensation increased after 1991 as follows:

	Salary	Bonus
1991	$118,000	$ 90,000
1992	$195,000	$100,000
1993	$267,000	$200,000
1994	$365,000	$270,000
1995	$405,000	
1996	$216,000	

40. The audited Aetna balance sheet as of October 31, 1991, and the audited statement of Aetna's earnings for the fiscal year ending October 31, 1991, were as follows:

AETNA BALANCE SHEET AT OCTOBER 31, 1991

ASSETS

CURRENT ASSETS	
Cash	$ 4,227,201
Accounts receivable less reserve for bad debts	6,599,191
Inventories	4,207,317
Other current assets	88,502
Deferred income taxes	236,575
Total current assets	$15,358,786

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PROPERTY, PLANT and EQUIPMENT	
at cost	3,155,020
Less accumulated depreciation	(2,081,994)
	1,073,026
OTHER ASSETS	225,717
	$16,657,529

LIABILITIES AND STOCKHOLDERS' EQUITY

CURRENT LIABILITIES	
Accounts payable	$ 1,575,230
Due to officers and employees	1,465,479
Accrued salaries and bonuses	631,000
Taxes other than income taxes	137,572
Accrued ESOP	360,633
Profit sharing contribution	168,869
Other current liabilities	33,586
Income taxes payable	93,000
Total current liabilities	4,465,369
DEFERRED COMPENSATION	275,000
STOCKHOLDER'S EQUITY	
Common stock	100,000
Capital in excess of par value	19,310
Retained earnings	12,854,294

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Capital and retained earnings	12,973,604
ESOP stock restriction	(360,633)
Treasury stock at cost	(695,811)
Total stockholders' equity	11,917,160
	$16,657,529

AETNA STATEMENT OF EARNINGS
Year ended October 31, 1991

Net Sales	$54,083,750
Cost of sales	43,661,033
Gross profit	10,422,717
Operating Expenses	9,081,886
Earnings from operations	1,340,831
Other income	259,880
Earnings before income taxes	1,600,711
Income taxes	627,123
NET EARNINGS	$ 973,588

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41. In support of their stock valuations, Aetna, and the valuation experts retained by it, relied, in part, upon Aetna's unaudited financial data for the twelve months ending April 30, 1992, which was less favorable than the 1991 fiscal year and historic data. However, in early 1992, Aetna (as well as the economy generally, according to the experts) was coming out of a business slump. Aetna's sales were going up (as reported to the board on April 10, 1992) and typically are strongest in the spring and summer months. Historically, Aetna's business has also been cyclical, tending to follow the economy. The focus on the twelve months ending April 30, 1992, failed to take into account then existing favorable Aetna data, favorable general economic data, and historic Aetna financial data, which is strongly confirmed by Aetna's performance both before and after 1992.

AETNA'S AUDITED FINANCIAL RESULTS
1987 – 1997

Fiscal Year	Sales	Gross Profit	Net Earnings
1987	$50,465,000	$ 8,493,182	$ 1,053,792
1988	55,040,000	9,711,540	1,504,568
1989	59,766,904	10,685,009	1,517,597
1990	58,449,712	10,761,559	1,139,386
1991	54,083,750	10,422,717	973,588
12 mos. ending 4/30/92 (unaudited)	$57,993,000	$10,810,000	$ 831,000

1992	60,347,505	10,907,265	495,818
1993	65,552,816	11,888,331	1,993,848
1994	71,902,657	12,673,455	2,317,609
1995	65,922,077	11,450,769	1,318,401
1996	64,028,983	11,582,983	571,157
1997	74,205,349	13,071,001	1,571,410

42. In order to obtain confirmation of the Turner valuations of Aetna's common stock Aetna sought the opinion of Zweifler. Zweifler's written appraisal included a study of price earnings ratios, capitalization of future earnings and adjusted equity values. The examination of these factors and most of the values suggested are within the ranges proposed by all of the experts in the case. However, the Zweifler appraisal contained three valuation errors that seriously undermined his conclusions.

43. In calculating per share value, Zweifler divided total equity and book value by 100,000 authorized shares rather than by the actual number of shares outstanding. At the time period he chose, April 30, 1992, 84,411 shares were outstanding and 15,589 shares were treasury shares. It is elementary, as admitted by the testifying experts, that treasury shares belong to all of the stockholders, increase the value of all shares and are not included when dividing total equity by shares outstanding to obtain per share book value. Adjusting for this error alone, dramatically increases the valuation proposed by Zweifler. Zweifler states, for example, that the per share book value of the stock (at April 30, 1992) is about $120 per share ($11,994,939 / 100,000 =

$120). Correcting for the actual number of shares outstanding, shows that the book value was $142 per share ($11,994,939 / 84,411 = $142) at that date.

Davis saw the per share book value error in Zweifler's analysis, but chose to ignore it.

44. Zweifler reduced the Company valuation by $6 million based on a hypothetical liability of the Company over six years when ESOP participants would be expected to exercise their right to "put" $6 million in shares back to the Company. This unsupported adjustment is a fiction. The reality of the stock transaction is that the stock acquired had no put rights. Such option only existed in favor of retiring employee participants when the stock was in the ESOP trust. The acquired shares that had such rights were retired and new shares were issued to the new owner. Adjusting for this valuation error adds $71 to the per share value ($6,000,000 / 84,411 = $71).

For the reasons just stated, Turner's related 15% discount of book value for repurchase liability, in his February and May 1992 appraisals, is also unsound and is rejected.

45. Zweifler opined that a 75% marketability discount should be applied because the Company's shares were owned and closely held, but suggested that a control premium of 30% was appropriate, resulting in a net discount of 45%. Considering again the nature of the transaction, no marketability discount was appropriate. Rather the valuation question to consider was the amount of the control premium to be added. What should have been analyzed was the sale

of total ownership and control to a very small minority stockholder by utilizing company assets and leveraging the ownership of the ESOP stockholders to finance the buy-out. It was intended that Davis become, and he did become, the sole owner of the Company with the opportunity to reap substantial monetary and ownership benefits at no cost to himself.

As stated by the Secretary of Labor in explaining the Proposed Regulations for determining adequate consideration, "a plan selling control should receive a control premium." 53 Fed.Reg. at 17636. If applied to book value, the 30% control premium suggested by Zweifler would add $43 to the per share book value ($142 x .30 = $43), indicating a total value in the range of $185 per share.

For the reasons previously stated, Turner's similar discount of book value for lack of marketability, in his February and May 1992 appraisals, is also unsound and is rejected.

46. Cerar, who was retained to issue a fairness opinion of the stock transaction, wrote a two-page letter that states nothing more than that $85.00 per share is fair to the ESOP participants. His letter recites reliance upon the opinions of Turner and Zweifler and information supplied by the Company. There is no evidence that Cerar ever discussed the transaction with the independent members of the ESOP committee, John and Thomsen, and there is nothing in his letter analyzing the transaction.

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47. In a deposition, Cerar conceded that there were several errors in the Zweifler valuation study which are not reflected in his opinion. He stated that, in arriving at a per share valuation, the number of authorized shares is irrelevant. Because the sale of the ESOP shares would extinguish the potential "put" liability regardless of to whom the ESOP sells, Cerar also acknowledged that it would be inappropriate to reduce the value of the Company for a contingent ESOP put liability. Cerar also conceded that the ESOP block of shares should not be valued as a minority. Cerar's opinion that $85 per share was fair is entitled to no weight.

48. Plaintiffs' expert, Brad Akason ("Akason"), is a well-qualified business valuation expert and partner in the firm of Coopers & Lybrand. Akason determined that the fair market value of the ESOP shares as of June 1, 1992 was $184 per share. Akason relied on the income-discounted cash flow method weighing expected returns against inherent risk and by discounting the sum of the estimated future cash flow in order to obtain present value. Akason considered the historical financial performance of the Company for the years ended October 31, 1977 through 1991. He used a four-and-one-half year forecast period ending October 31, 1996 and compared Aetna's performance with a representative group of public companies. He forecasted the cash flows using the following assumptions:

(a) Net sales were forecasted using a growth rate of 6.3%, consistent with Aetna's actual compounded annual growth over the period 1977-1991.

(b) A forecasted earnings before interest and taxes margin was 4.575% based on the 15-year average historical adjusted data.

(c) Income taxes were forecast at a blended rate of 38.8% based on the actual federal rate in 1992 of 34% and the actual state rate in 1992 of 7.3%.

(d) Depreciation and capital expenditures were forecast based on their historical 15-year average percentage of net sales.

(e) Aetna's change in working capital was forecasted to return to its 15-year average of 13.51% of sales over the following five years.

(f) Available cash flow in the residual period was estimated to grow at 3.9% per year based on an estimate of expected inflation as printed in the "The Blue Chip Indicator."

(g) Excess cash was calculated as the difference between Aetna's actual cash balance as of April 30, 1992 and the level indicated based on applying the industry average cash as a percent of total assets as reported in the 1991 Robert Morris Associates' Industry Averages study.

(h) The weighted average cost of capital is the return required by a company's equity and debt holders. A 15% rate was used to discount future, available debt-free cash flows.

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(i) The sum of the present value of cash flows during the forecast period totals $5.8 million; the present value of residual cash flows equals $9.1 million; and the excess cash equals $2.2 million. Based on these figures, Akason concluded that the value of Aetna's total invested capital was $17.1 million.

(j) Akason reduced the value of total invested capital by Aetna's interest-bearing debt. Interest-bearing debt consisted of the outstanding balance owed by the ESOP to Lake Shore National Bank, $150,227, which was guaranteed by Aetna, and another $1,445,000 owed to Officers & Employee Savings. Akason concluded that the value of the common equity of Aetna on a controlling basis was $15.5 million or $184 per share as of June 1, 1992.

49. On February 22, 1996, defendants' expert, Timothy Fagan ("Fagan") of Houlihan Lokey Howard & Zukin, retained after this case was filed, issued a report of his valuation of the ESOP shares at the time of the stock transaction. Fagan was the only expert called to testify by the defendants. He concluded, based on adjusted financial results for twelve months ending April 30, 1992, that the fair market value of the common stock of Aetna Plywood was within the range of $7,200,000 to $7,800,000 in aggregate or $85.30 to $92.41 per share based on 84,411 shares of common stock issued and outstanding. Fagan adopted a market capitalization approach which focused on what a buyer would pay rather than what it would be reasonable for an ESOP seller to demand. He gave no attention to the benefits of the transaction to the buyer as a factor relating to the overall fairness of the transaction.

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Fagan identified five valuation steps:

(a) Determination of earnings levels considered to be representative of future operating performance;

(b) Selection of comparable public companies to be used for comparison purposes;

(c) Performance of a comparative risk analysis of the comparable market multipliers;

(d) Selection of appropriate market multiples; and

(e) The determination of the value of total invested capital.

(f) In determining the earnings level considered to be representative of the future operating performance of the Company, Fagan used just the single period — twelve months preceding April 30, 1992, as the representative net earnings to be capitalized. Seven public companies were selected for comparison purposes: Bird Corporation, BMC West Corporation, NCI Building Systems, Inc., Patrick Industries, Inc., Shelter Components Corporation, Waxman Industries, and Wolohan Lumber Company. Aetna was smaller than the comparables in terms of revenues, total assets, and shareholders' equity, and was found to have weaker growth and slightly weaker profitability. Aetna ranked in the middle level among comparable companies in virtually all other categories. Aetna had stronger leverage, liquidity, and activity ratios. Fagan concluded that Aetna appeared to represent a greater investment risk, for a given return, than the comparables as a group.

(g) Fagan found that the 1992 economy was recovering. Gross Domestic Product rose at 2.0 percent in the first quarter of 1992 and the Consumer Price Index rose 1.0 percent in the first quarter of 1992, reflecting an increase in all sectors of the economy. Indicators, such as new home sales, factory orders and shipments and personal income, all pointed to a mild expansion in the first quarter of 1992. However, Fagan used only a one-year income cycle in determining future performance, rather than using a multiple-year or weighted average income figure. He used the earnings numbers for Aetna for the 12 months preceding the sale, although those numbers were clearly lower than all other recent years. Aetna's sales did recover, and its gross margins remained in the high teens, its net profits affected primarily by increases in administrative expenses, some of which included Davis's own compensation increases and bonuses.

(h) Fagan stated that all six measures examined would have been proportionately increased by the amount that representative net income is increased. An income stream of $1,025,000, which is more representative of Aetna's annual net income than the $750,000 figure utilized by Fagan, increases the Company value by 37% from $85-92 to $116-124.74 per share. Fagan assumed that the Company's excess cash was only $1 million. Using a $3 million excess cash figure as of June 1991, plus the earnings through April 30, 1992, increases the value by $40.28 per share. In 1993 and following years, Aetna's sales rebounded, its gross margins remained strong and its earnings soared to new heights.

(i) Fagan's observation that the Company's capitalized income stream must be reduced by the amount of its pre-

redemption annual contribution to the ESOP plan, because the plan would have to be replaced by some other employee benefit plan, has never been realized and is not supported by events at the time of the transaction or since.

50. The testifying experts applied a similar approach of valuing Aetna as the sum of a future income or cash flow stream to be "capitalized," or converted from the income figure to an amount of capital at an appropriate rate. The multiplier is the inverse of the rate chosen. To this is added the amount of any excess cash on hand which could be distributed to shareholders because it is not needed by the business.

51. The correct income figure to be used for capitalizing is at least $1.025 million, the figure used by Zweifler, whose information on Aetna and its prospects came directly from Davis at the time of the transaction. Zweifler's multiplier was 15 which was also the median multiplier for Fagan's comparables, and is consistent with Akason's analysis of value.

52. Aetna's business operations reasonably had a value of $15 million. Adding $1-2.5 million to reflect excess cash on hand, results in an aggregate company value of $16-$17.5 million.

53. The business operations value is consistent with the net book value approach, based on net equity of $11.99 million, plus $2.8 million appreciated real estate, and 10% for goodwill, resulting in an aggregate value of $16.3 million.

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54. Defendant committee members Davis and Francione passively accepted the Zweifler report, ignoring its obvious defects, and passively accepted the Turner valuation reports applicable only to an adjusted book valuation of a minority block of shares. Davis recognized defects which he chose not to disclose to the others.

55. Based on Aetna's very strong financial condition, its excellent prospects and history, and the valuation evidence at the time of the transaction, the Aetna shares were worth at least book value of $142 per share plus a control premium. A conservative control premium of 20% is well within the ranges reported by the valuation experts. Accordingly, the range of adequate consideration was between $142 and $170 per share. The ESOP fiduciaries failed to obtain adequate consideration for the control shares sold which was no less than the mid-point of the range. The plaintiff class is entitled to damages in the amount of $70 per share for the ESOP's 79,876 shares, less those shares which were in the accounts of the defendants.

56. Of the 79,876 outstanding ESOP shares at the time of the sale, 6,030.94 were owned by Francione and 1,386.28 were owned by Davis. The other 72,458.78 shares were owned by members of the plaintiff class.

57. In settlement with John and Thomsen, on February 11, 1998, the plaintiff class constructively received $800,000. That money is deposited in an interest bearing account. Receipt of that money is contingent on the settlement being approved by the court.

58. At $70 per share for 72,458.78 shares, the total damages for the class are $5,072,114.60.

59. The parties agree that the prime rate at the following dates were as follows. *See* Attachment to Plaintiffs' July 8, 1998 Letter at 8-10; Exhibit A to Defendants' July 10, 1998 Objections to Draft Order.

June 1992	6.50%
December 1992	6.00%
June 1993	6.00%
December 1993	6.00%
June 1994	7.25%
December 1994	8.50%
June 1995	9.00%
December 1995	8.65%
June 1996	8.25%
December 1996	8.25%
June 1997	8.50%
December 1997	8.50%
June 1998	8.50%

60. Using the prime rate to calculate prejudgment interest and compounding the interest every six months on June 30 and December 31, prejudgment interest through December 31, 1997 would be $2,645,411.95 for a total of damages plus interest of $7,717,526.55. The biannual calculations are as follows:

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Through	Days	Principal	Interest	Rate
063092	18/366	5,072,114.60	16,214.14	6.50
123192	184/366	5,088,328.74	153,484.01	6.00
063093	181/365	5,241,812.75	155,961.88	6.00
123193	184/365	5,397,774.63	163,264.20	6.00
063094	181/365	5,561,038.83	199,930.77	7.25
123194	184/365	5,760,969.60	246,853.60	8.50
063095	181/365	6,007,823.20	268,129.97	9.00
123195	184/365	6,275,953.17	273,665.95	8.65
063096	182/366	6,549,619.12	268,695.44	8.25
123196	184/366	6,818,314.56	282,792.39	8.25
063097	181/365	7,101,106.95	299,316.52	8.50
123097	184/365	7,400,423.47	317,103.08	8.50
		7,717,526.55		

61. Prejudgment interest on $7,717,526.55 from January 1, 1998 through February 11, 1998 (42 days) at 8.50% interest would be $75,483.75. On February 11, 1998, the plaintiff class received $800,000 from John and Thomsen. Prejudgment interest on $6,917,526.55 from February 12, 1998 through June 30, 1998 (139 days) at 8.50% interest would be $223,919.39. As of June 30, 1998, the damages plus accumulated interest less the offset would be $7,216,929.69.

62. Prejudgment interest on $7,216,929.69 from July 1, 1998 through July 16, 1998 (16 days) at 8.50% would be $26,890.48. As of July 16, 1998, damages are $4,272,114.60 and prejudgment interest is $2,971,705.57 for a total of $7,243,820.17.

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III. CONCLUSIONS OF LAW

As fiduciaries of the ESOP and directors of Aetna, defendants had obligations of loyalty, care, and fair dealing to the ESOP and its participants who were Aetna shareholders. Shay, 100 F.3d at 1488; Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1187 (Del.1988). They were required to exercise care, skill, prudence, and diligence in the sale of the Aetna stock held by the ESOP. *See* 29 U.S.C. § 1104(a)(1)(B); Atwood Grain & Supply Co. v. Growmark, Inc., 712 F.Supp. 1360, 1366 (N.D.Ill.1989).

Under Delaware law, in a "change of control" transaction, the directors have a heightened obligation to the shareholders to inform themselves fully of the value of a company's shares; maximize value recoverable for all shareholders; and obtain full fair market value on any sale of shares. Decisions under the Delaware Revlon doctrine hold that, once the directors have determined to enter the corporation into a "change of control" transaction, the directors owe a duty to obtain the maximum possible price for the selling shareholders. Revlon, Inc. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 18_ (Del.1985).

In a self-dealing transaction, Delaware corporate and fiduciary law gives no deference to "business judgment" and judicial scrutiny is applied regarding both "fair dealing" and "fair price." Unitrin Inc. v. American General Corp., 651 A.2d 1361, 1372 (Del.1995); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del.1989); David J. Greene Co. v. Schenley Industries, Inc., 281 A.2d 30, 32 (Del.Ch.1971). Fair dealing focuses on the procedures used

in seeking a buyer and fair price on whether the directors obtained the highest value reasonably available. Mills, 559 A.2d at 1280.

The June 1992 ESOP sale was a prohibited transaction under § 406(a) of ERISA, 29 U.S.C. § 1106(a), as a sale between the plan and a party in interest. The transaction was only exempt if it can be shown by the defendants that the Plan received "adequate consideration." 29 U.S.C. § 1108(e)(1). Adequate consideration means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary [of Labor]." 29 U.S.C. § 1002(18)(B). The principal focus is on the thoroughness of the fiduciary's investigation. Shay, 100 F.3d at 1488.

The transaction in which Aetna redeemed more than 95% of the outstanding shares involved self-dealing. The transaction bore a heightened scrutiny standard, on which the defendants bear the burden of proving that the transaction was fair and of benefit to the ESOP shareholders. *Id.;* Cede, 634 A.2d at 361.

> A fiduciary who engages in a self-dealing transaction pursuant to 29 U.S.C. § 1108(e) has the burden of proving that he fulfilled his duties of care and loyalty and that the ESOP received adequate consideration. [Cunningham, 716 F.2d] at 1467-68; *see also* Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir.1978). This burden is a heavy one. When it is "possible to question the

> fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." Leigh v. Engle, 727 F.2d 113, 125-26 (7th Cir.1984).
>
> Although securing an independent assessment from a financial advisor or legal counsel is evidence of a thorough investigation, Martin v. Feilen, 965 F.2d 660, 670-71 (8th Cir.1992), it is not a complete defense to a charge of imprudence. *See* [Donovan v.] Mazzola, 716 F.2d [1226,] 1234 [(9th Cir.1983)]. As Judge Friendly has explained, independent expert advice is not a "whitewash." Donovan v. Bierwirth, 680 F.2d 263, 272 (2d Cir.1982); Donovan v. Walton, 609 F.Supp. 1221, 1227 n. 10 (S.D.Fla.1985); Cator v. Herrgott & Wilson, Inc., 609 F.Supp. 12, 16 (D.C.Cal.1984). The fiduciary must (1) investigate the expert's qualifications, Mazzola, 716 F.2d at 1234, (2) provide the expert with complete and accurate information, Cunningham, 716 F.2d at 1467, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances. Id. at 1474; *see also* Jordan, Pflepsen, Jr., & Goldberg, *ERISA Litigation Handbook,* § 3.03[A] (1994).

Shay, 100 F.3d at 1488-89.

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Directors must represent the interests of all shareholders alike and owe a fiduciary duty not to favor one shareholder over another. It thus has long been the law that directors' actions to enrich themselves, or favor one shareholder unequally over another, are illegal and invalid breaches of the fiduciary duties.

The evidence clearly shows that there was no compelling need to sell the Aetna shares held by the ESOP in May of 1992. Neither the Company's "put liability" nor existing business conditions required that Aetna buy, or that the ESOP sell, the Aetna stock. The reality is that the motive behind the transaction, at least from the point of view of Davis and Francione, was the transfer of control and ownership to Davis. It is arguable, therefore, that since the transaction was not for the benefit of the ESOP participants, that it could be set aside. The plaintiff class, however, does not seek to avoid the sale, but rather seeks to obtain adequate consideration, as that term is defined under ERISA and understood under Delaware law.

Under ERISA, adequate consideration is itself an objective standard. Cosgrove v. Circle K Corp., 871 F.Supp. 1248, 1251 (D.Ariz.1994); Reich v. Valley National Bank of Arizona, 837 F.Supp. 1259, 1293 (S.D.N.Y.1993). Whether the fiduciary violated his or her duties, however, is not purely a question of whether the amount of consideration satisfied an objective standard of adequate consideration. Instead, it must be considered whether the fiduciary conducted a prudent and sufficient investigation and employed sound principles of evaluation in accepting the appraisals and other means for determining the consideration

to be paid. As long as the fiduciary's conduct was objectively reasonable in determining the consideration to be paid, no fiduciary violation occurs even if the consideration paid differs somewhat from what the court determines to be adequate consideration. Cunningham, 716 F.2d at 1467-68; Eyler v. Commissioner, 88 F.3d 445, 454-55 (7th Cir.1996).

Section 1002(18)(B) of ERISA requires that in the case of a plan asset, other than a security for which there is a generally recognized market, adequate consideration means fair market value determined in good faith according to the terms of the plan and in accordance with regulations promulgated by the Secretary of Labor. It is conceded that there was no generally recognized market for the Aetna shares.

Fair market value is defined as "the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well informed about the asset and the market for such asset." Proposed Regulation, § 2510.3-18(b)(2)(i), 53 Fed.Reg. 17637. *See also* Cosgrove v. Circle K Corp., 915 F.Supp. 1050, 1064 (D.Ariz.1995), *aff'd by unpublished order*, 107 F.3d 877 (9th Cir.1997). The fair market value is to be determined as of the date of the transaction. Proposed Regulation § 2510.3-18(b)(2)(ii). The facts establishing value are to be set forth in written documentation meeting certain prescribed standards. Proposed Regulation § § 2510.3-18(b)(2)(iii), (b)(4).

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The "good faith" requirement establishes an objective rather than a subjective standard of conduct, the assessment of which is to be made in light of all relevant facts and circumstances. Relevant facts and circumstances will include a showing of a prudent investigation of circumstances prevailing at the time of the valuation, and the application of sound principles of evaluation. Proposed Regulation § 2510.3-18(b)(3).

The "good faith" standard also requires that the fiduciary making the evaluation, or the appraiser on whose report the fiduciary relies, be independent of all parties to the transaction other than the plan. Proposed Regulation § 2510.3-18(b)(3)(ii). A person is not independent if that person is directly or indirectly under the control of any party to the transaction. Control is further defined to mean the power to exercise a controlling influence over the management or policies of that person. Proposed Regulation § 2510.3-18(b)(3)(iii). All relevant facts and circumstances are to be considered.

Based on the facts as found in this case, it is clear that the Turner valuations did not meet the good faith requirement. Turner had for many years given advice to the Davis family concerning their control of the Company. His proposed services related to the transaction were directed at obtaining control of the Company for Davis. He was in no sense independent of Davis or Aetna.

In the supplementary information published in connection with the Proposed Regulation, the Secretary states:

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> [A]n appraiser will be considered independent of all parties to a transaction (other than the plan) only if a plan fiduciary has chosen the appraiser and has the right to terminate the appointment, and the plan is thereby established as the appraiser's client. Absent such circumstances, the appraiser may be unable to be completely neutral in the exercise of his function.

Proposed Regulation, Supp. Information § B(3), 53 Fed.Reg. 17635.

The Zweifler and Cerar valuations are also open to the objection that Turner and Davis selected and dealt with them concerning the transaction. There is no evidence that either appraiser ever reported to, or conferred with, John or Thomsen, the only independent fiduciaries, either before or after the May 5, 1992 resolution approving the transaction.

An independent valuation is not obtained by fixing a price, as in the Aetna May 5, 1992 board resolution, and then obtaining appraisals in confirmation of that price. A prudent investigation must precede, not follow, the valuation of an ESOP asset.

Moreover, the determination of a specific price — rather than the development of a price range — necessarily precluded any negotiations by the independent fiduciaries on behalf of the ESOP participants for the best price available. As stated by the Secretary:

> The Department is aware that the fair market value of an asset will ordinarily be identified by a range

> of valuations rather than a specific set figure. It is not the Department's intention that only one valuation figure will be acceptable as the fair market value of an asset. Rather, this proposal would require that the valuation assigned to an asset must reflect a figure within an acceptable range of valuations for that asset.

Proposed Regulation, Supp. Information § B(2), 53 Fed.Reg. 17634.

Defendants' appraisals and expert testimony also fail in presenting any analysis of the fairness of the transaction by comparing the benefits that were to be obtained by Davis as a result of the repurchase with the price to be received by the plaintiff class. As stated by an expert, recognized as such by the parties:

> Fairness from a financial point of view must also consider relative fairness to the ESOP compared to other parties to the transaction. Arguably, an ESOP could pay no more than fair market value for its stock yet receive a deal which was unfair compared to other investors. Financial fairness may also consider the terms of the financing and the ultimate equity allocation in a multi- investor, leveraged ESOP transaction.

James H. Zukin, ed., *Financial Valuation: Businesses and Business Interests* § 8.9 (Appendix).

The Proposed Regulation for the determination of adequate consideration specifies the content of valuation

documents. When, as here, the asset is a security for which there is no generally recognized market, a special rule requires that additional information be contained in any appraisal. Proposed Regulation § 2510.3-18(b)(4)(ii), 53 Fed.Reg. 17638. The factors particularly relevant to this case are the "economic outlook in general and the condition and outlook of the specific industry;" "the book value of the securities and the financial condition of the business;" "the earning capacity of the company;" "the dividend-paying capacity of the company;" "whether or not the enterprise has goodwill or other intangible value;" "the market price of securities of corporations engaged in the same or similar lines of business, which are traded in a free and open market"; "the marketability of the securities;" and "whether or not the seller would be able to obtain a control premium from an unrelated third party with regard to the block of securities being valued." With respect to a control premium, the Secretary has stated that "a plan selling control should receive a control premium." Proposed Regulation, Supp. Information § B(5), 53 Fed.Reg. 17636.

When all aspects of the Aetna buy-back transaction are considered, it is clear that no marketability reduction was appropriate. The stock purchased was not burdened by a "put" option, but was retired. Moreover, a control premium was clearly required. Sole control of the Company was obtained by defendant Davis essentially without any cost to him. The benefits of the transactions to Davis included the opportunity for substantial dividends, an increased salary, large bonuses and the acquisition of company property. An analysis of the potential benefits to the buyer was and is a necessary part of establishing the fair market value of the ESOP shares.

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As the defendants point out, a court reviewing an issue of adequate consideration is not initially called upon to redetermine the valuation of an asset *de novo.* Rather, it is to consider whether the price of the asset was determined in good faith by way of a prudent investigation and the application of sound principles of business valuation. Cunningham, 716 F.2d at 1467-68; Eyler, 88 F.3d at 454-55. The facts in this case show that the defendants' valuation of the ESOP participants' Aetna stock at $85.75 per share fails to meet the requirements of good faith, prudent investigation and sound principles of business evaluation. In finding that the plaintiff class is entitled to recover damages for inadequate consideration, certain valuation errors which are contrary to sound principles of business valuation have been rejected, but, otherwise, the appraisal analysis which is not in dispute has been followed. As the findings indicate, it has not been necessary to make a *de novo* determination of value in order to conclude that the plaintiff class is entitled to recover an additional sum for its shares.

On the facts presented, defendants Davis, Francione and Aetna Plywood, Inc. are clearly liable to the plaintiff class, both under ERISA and applicable Delaware law, for having failed to sell the stock for adequate consideration.

ERISA plaintiffs are not entitled to receive a double recovery of damages. Mira v. Nuclear Measurements Corp., 107 F.3d 466, 473 (7th Cir.1997); Central States, Southeast & Southwest Areas Pension Fund v. Bell Transit Co., 22 F.3d 706, 713 (7th Cir.1994). The federal common law has been held to include the concept of offset. *See* Corder v.

Brown, 25 F.3d 833, 839 (9th Cir.1994). There is no reason why that rule should not be applied under the circumstances of the present case. Any damages recoverable from John and Thomsen would have been on the same basis as the award against the other defendants, a below market value price being paid for the ESOP stock. The $5,072,114.60 in damages is based on the full underpayment of value. Any additional recovery from John and Thomsen would be a double recovery windfall. The amount received from John and Thomsen as a settlement of the claims against John and Thomsen is an offset against the damages awarded against defendants Aetna Plywood, Davis, and Francione.

The parties agree that, under ERISA, plaintiffs are entitled to an award of prejudgment interest.[3] *See* Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., 896 F.2d 228, 236 (7th Cir.1990). Prejudgment interest is viewed as a form of compensatory damage designed to make the plaintiff whole and place him or her in the same position as if no violation had occurred. City of Milwaukee v. Cement Division, National Gypsum Co., 515 U.S. 189, 195, 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995); Lorenzen, 896 F.2d at 236; Cement Division, National Gypsum Co. v. City of Milwaukee, 144 F.3d 1111, __, 1998 WL 270027 *1 (7th

3. There is no contention that an award of prejudgment interest is also supported by Delaware law. *See generally* Gaffin v. Teledyne, Inc., 611 A.2d 467, 476 (Del.1992); Ryan v. Tad's Enterprises, Inc., 709 A.2d 682, 705 (Del.Ch.1996), *aff'd by unpublished order*, 693 A.2d 1082 (Del.1997); Reeves v. McReynolds, 1996 WL 342100 *4 (Del.Ch. June 12, 1996); 6 Del.C. § 2301(a). Therefore, only ERISA law is considered for purposes of determining an appropriate rate of prejudgment interest.

Cir.1998); Hizer v. General Motors Corp., 888 F.Supp. 1453, 1463 (S.D.Ind.1995). There is also a goal of avoiding unjust enrichment for the wrongdoer. Lorenzen, 896 F.2d at 236; Wells v. United States Steel, 76 F.3d 731, 738 (6th Cir.1996); Dimensions Medical Center, Ltd. v. Aetna Life Insurance Co., 1997 WL 534548 *4 (N.D.Ill. Aug. 26, 1997).

The Seventh Circuit has held that the prime rate is generally the appropriate rate to use for prejudgment interest. National Gypsum, 144 F.3d 1111, 1112- 13; In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1331 (7th Cir.1992); Partington v. Broyhill Furniture Industries, Inc., 999 F.2d 269, 274 (7th Cir.1993); Barrow v. Falck, 11 F.3d 729, 732 (7th Cir.1993). Also, the interest should be compounded so as to more closely put the plaintiff in the position he or she otherwise would have been in. National Gypsum, 144 F.3d 1111, 1112-1113; Neal v. Honeywell, Inc., 995 F.Supp. 889, 897 (N.D.Ill.1998); Hizer, 888 F.Supp. at 1465; United States v. Mason Tenders District Council of Greater New York, 909 F.Supp. 891, 895 (S.D.N.Y.1995).

Plaintiffs argue the appropriate prejudgment interest rate is the amount earned by the Aetna Plywood Inc. Profit Sharing Plan, which is where the proceeds of the ESOP stock sale were placed. However, none of the cases cited by plaintiffs actually award prejudgment interest based on what was earned by a fund involved in the particular case. Plaintiffs cite Leigh v. Engle, 619 F.Supp. 154, 160 (N.D.Ill.1985). The discussion in that case, however, concerns the direct calculation of damages, not any award of prejudgment interest. In subsequent proceedings in that

case, it was determined that no prejudgment interest would be awarded. *See* Leigh v. Engle, 669 F.Supp. 1390, 1405-06 (N.D.Ill.1987), *aff'd,* 858 F.2d 361 (7th Cir.1988), *cert. denied,* 489 U.S. 1078, 109 S.Ct. 1528, 103 L.Ed.2d 833 (1989). Similarly, Eaves v. Penn, 587 F.2d 453 (10th Cir.1978), involves the question of damages and no issue of prejudgment interest. At trial in the present case, plaintiffs sought damages in the form of the difference between the price at which the stock was sold and its fair market value. Such damages are being awarded and the present question is the appropriate method of calculating prejudgment interest, not the appropriate method of calculating damages. Plaintiffs also cite Russo v. Unger, 845 F.Supp. 124, 126 (S.D.N.Y. 1994) (quoting Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 286 (2d Cir.1992)), for its statement that "assessing the appropriate amount of interest requires a comparison of what the plan earned during the time in question and what it would have earned had the money lost due to the breach been available." Russo, 845 F.Supp. at 127, however, declined to use the rate of return that the retirement plan had earned and instead used the Internal Revenue Code interest rate for tax underpayments and overpayments. *See* 26 U.S.C. § 6621. Plaintiffs also cite Mason Tenders, but, like Russo, that case uses the § 6621 rate, not the actual amount earned by the fund involved in the case. Mason Tenders, 909 F.Supp. at 895.

Although not cited by plaintiffs, Rybarczyk v. TRW, Inc., 1997 WL 580609 * 3-4 (N.D.Ohio Sept.5, 1997), awards prejudgment interest based on the actual rate of return the defendant earned while holding the improperly retained funds. That is the only ERISA case this court has found that

awards prejudgment interest based on an amount actually earned. A number of other cases were found, though, that expressly recognize that prejudgment interest is designed to make the plaintiff whole, but still use external rates that are independent of any rate actually earned by a fund or party. *See* Kinek v. Paramount Communications, Inc., 22 F.3d 503, 514 (2d Cir.1994) (discount rate); Thomas v. Board of Trustees of International Union of Operating Engineers, Local 542, Pension Fund, 1998 WL 334627 *13 (E.D.Pa. June 24, 1998) (postjudgment interest treasury bill rate provided for in 28 U.S.C. § 1961); Haberern v. Kaupp Vascular Surgeons, Ltd., 1995 WL 312508 *1 (E.D.Pa. April 28, 1995) (same); Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co., 780 F.Supp. 1447, 1462 (E.D.Pa.1991) (same); Mason Tenders, supra (Internal Revenue Code interest rate); Russo, supra (same).

There is no evidence regarding investment decisions made by the Profit Sharing Plan. It is unknown whether receiving almost twice as much in proceeds would have affected that Plan's investment decisions. There is also no evidence regarding how many members of the plaintiff class have or were eligible to withdraw some or all of their funds out of the Profit Sharing Plan. The prime rate represents a reasonable rate of return that makes a party whole. Also, damages and interest through July 16, 1998 of over seven million dollars plus an award of attorney fees (and another $800,000 from John and Thomsen which apparently was partially or wholly funded by Aetna Plywood) will not leave Aetna Plywood, Davis, or Francione unjustly enriched despite their wrongdoing.

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Prejudgment interest will be based on the prime rate, with interest compounded biannually on June 30 and December 31. As of July 16, 1998, the damages to be awarded against Aetna Plywood, Davis, and Francione are $4,272,114.60 (taking into account the offset) and accumulated prejudgment interest is $2,971,705.57.

Federal Rule of Civil Procedure 54(b) permits the entry of a judgment as to less than all the parties. *See* Lawyers Title Insurance Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1162-63 (7th Cir.1997). The present situation, however, is not an appropriate one for entering a final judgment as to Aetna Plywood, Davis, and Francione since the judgment to be entered against these parties relies in part on resolution of the claims against John and Thomsen. Until a determination is made as to the fairness of the settlement with John and Thomsen, no final determination can be made as to the precise amount of damages. If the settlement is approved, then application of the $800,000 setoff is appropriate. However, if it is not approved, then no setoff is appropriate. Also, if the settlement is not approved, findings and conclusions will have to be entered as to John and Thomsen and any appeal that might be taken would have substantial factual and legal overlap with any appeal that might be taken by the other parties. No Rule 54(b) judgment will be entered at this time. A judgment will be entered based on the assumption that the settlement will be approved and awarding prejudgment interest through July 16, 1998. Since no Rule 54(b) finding is being made, the judgment will not be final and appealable, except possibly as to injunctive relief that is ordered, until judgment is also entered as to John and Thomsen.

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It is recognized that this court does not lose jurisdiction to hear motions for reconsideration until more than 10 days after a final judgment is entered. Fed.R.Civ.P. 59(e). Because of the time necessary to issue notice to the class and hold a hearing on the fairness of the settlement, there will be a delay before a final judgment is entered. However, there is no good reason to delay any possible motions for reconsideration. As a prudential matter based on sound judicial case management, this court will decline to consider any motions for reconsideration regarding today's order that are filed more than 10 days (as measured by Fed.R.Civ.P. 6(a)) beyond the date the judgment as to Aetna Plywood, Davis, and Francione is entered on the docket.

In light of the fiduciary violations that have been found, defendants Davis and Francione will be removed and barred from any fiduciary capacity with the Aetna Plywood Inc. Profit Sharing Plan. Within one week from the date of today's order, the parties shall meet to discuss an appropriate method of replacing Davis and Francione in their fiduciary positions. By July 30, 1998, the parties shall submit a single brief (or separate briefs if they could not agree) setting forth their proposal as to this issue.

Plaintiffs request an award of fees as against defendants Aetna Plywood, Davis, and Francione. Seventh Circuit case law recognizes two tests for awarding attorney fees in an ERISA action such as the present one.[4]

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4. Plaintiffs do not contend they are entitled to a fee award under Delaware law. *See generally* Ryan, 709 A.2d at 706.

> The first looks simply at whether the losing party's position was substantially justified, and the second . . . looks to the following factors:
>
> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees; (3) whether or not an award of attorneys' fees would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.

Brewer v. Protexall, Inc., 50 F.3d 453, 458 (7th Cir.1995).

Here, defendants' position in the litigation was not substantially justified. As previously stated, errors in the valuations and defendants' liability are clear. Defendants underpaid plaintiffs by almost 50%. They ignored evident errors in the valuation reports, one of which Davis admitted that he had recognized, and made no attempt to obtain an independent valuation of the stock. Defendants' position in this litigation that they paid fair market value for the stock is not substantially justified. That is a sufficient basis for awarding fees against all three liable defendants. A fee award is further justified by the fact that defendants acted intentionally and with a motive to greatly enrich themselves.

As against defendants Aetna Plywood, Davis, and Francione, plaintiffs are awarded their reasonable costs and attorney fees. The award of attorney fees is for the ERISA

claims against Aetna Plywood, Davis, and Francione. By August 3, 1998, plaintiffs shall file their motion for fees and costs and accompanying brief. At least one week prior to that date, plaintiffs must provide a draft of their motion to defendants so that the parties can seek to settle any differences they may have as to fees. Also, plaintiffs' motion must clearly set forth any adjustment or exclusions made for legal work done regarding the Delaware law claims and the claims against John and Thomsen and the brief in support of the motion must address the related legal issues.

Additionally, class counsel has indicated that he will seek fees from the class representing one-third of the class's recovery. *See generally* Cook v. Niedert, 142 F.3d 1004 (7th Cir.1998). Any motion and the supporting brief for such a request must be filed by August 3, 1998. Such motion must include a copy of any fee agreement between named plaintiff and counsel. The motion must also set forth the total number of hours reasonably expended on the case and what the fee would be if based on an hourly rate. No determination has yet been made as to whether such a fee award is appropriate. But if such a percentage basis fee is awarded, it will be based on a percentage of the damages, settlement, and prejudgment interest actually collected by the plaintiff class. Contrary to what counsel has indicated, any statutory fee award to be paid by defendants will not be included in the pool from which the percentage fee award is calculated.

IT IS THEREFORE ORDERED that:

(1) Findings of Fact, Conclusions of Law, and Order dated June 11, 1998 are vacated.

(2) Enter Amended Findings of Fact and Conclusions of Law.

(3) The Clerk of the Court is hereby directed to enter a judgment on the merits in favor of the plaintiff class and against defendants Aetna Plywood, Inc., Jeffrey Davis, and John Francione:

(a) In the amount of $4,272,114.60 damages and $2,971,705.57 prejudgment interest for a total of $7,243,820.17;

(b) Removing defendants Jeffrey Davis and John Francione from any fiduciary capacity with the Aetna Plywood, Inc. Profit Sharing Plan and barring them from ever again serving in such a capacity; and

(c) Awarding the plaintiff class their reasonable costs and attorney fees.

(4) By July 30, 1998, the parties shall file position briefs regarding the replacement of Davis and Francione in their fiduciary capacities.

(5) Payment of the judgment amounts shall be made to the LaSalle National Bank account administered by Class Counsel with the funds held in trust until further order of the court.

APPENDIX I — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JANUARY 2, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 3193

HOWARD R. MONTGOMERY, for himself and for all others similarly situated and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan, Nominal Defendants,

Plaintiffs,

v.

AETNA PLYWOOD, INC., a Delaware corporation, JEFFREY DAVIS, a trustee of Aetna Plywood, Inc., ESOP, JOHN FRANCIONE, a trustee of Aetna Plywood, Inc., ESOP, PETER JOHN, a trustee of Aetna Plywood, Inc., ESOP, and PETER THOMSEN, a trustee of Aetna Plywood, Inc., ESOP,

Defendants.

Jan. 2, 1997

* * *

MEMORANDUM OPINION AND ORDER

Appendix I

HART, District Judge.

In this class action, former participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") claim that defendants breached their fiduciary duties when defendant Aetna Plywood, Inc. ("Aetna Plywood") repurchased its stock from the ESOP for an allegedly undervalued price. The individual defendants were all trustees of the ESOP during the pertinent time period. In a proposed amended complaint, they are also alleged to have been directors of Aetna Plywood during the pertinent time period. Counts I and II assert breach of fiduciary duty claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Count I alleges a violation of 29 U.S.C. § 1104(a)(1) which requires that investments be made in the interests of the participants and beneficiaries and in a prudent manner. Count II is a claim for a violation of 29 U.S.C. § 1106 which prohibits certain self-dealing. Defendant Davis, one of the trustees, owned all shares of Aetna Plywood not owned by the ESOP and became the sole owner of Aetna Plywood upon the repurchase of the ESOP stock. Plaintiffs move to amend their complaint to add a claim under Delaware law that defendants' conduct, in their role as directors of Aetna Plywood, also constituted a breach of their fiduciary duty to the shareholders of the corporation. Defendants oppose the motion to amend and move for summary judgment on the ERISA counts on the ground that the claims are untimely under ERISA's statute of limitations.

Summary judgment will be considered first. The parties do not dispute the pertinent underlying facts. On April 24,

1992, the trustees of the ESOP sent a letter to the ESOP participants.[1] The letter informed participants that all shares owned by the ESOP would be allocated to individual accounts of participants by the end of fiscal year 1992. The trustees stated that they "believe[d] it would be prudent" to thereafter convert the retirement funds from company stock to more diversified and liquid investments. The trustees further stated that they were "considering" making this change. It was also stated:

> The value of Company stock at October 31, 1991 was $85.75 per share. There will be a more current valuation by an independent appraisal firm before the conversion from Aetna stock to more diversified and liquid investments can be completed, and you would be advised as to that value. On October 31st, 1992 there will be a final distribution of shares to your account, and then following a final valuation those shares would then be converted to cash and transferred to the Profit Sharing Plan at [Lake Shore National Bank] for investment.

The participants were also informed that, "if" all the ESOP's shares are repurchased by Aetna Plywood, the only remaining common stock would all be owned by the Davis family.

The letter closed by stating:

> This would be a major financial transaction by the Company, and as such, we would like any

1. No information is provided regarding whether all members of the class received a copy of this letter in April 1992.

> input and/or opinions concerning this matter. Therefore, we have enclosed a survey form and a self-addressed stamped envelope for your completion. So that this transaction may be completed in a timely fashion, please respond within ten (10) days. We look forward to your response.

As of April 1992, named plaintiff Howard Montgomery was a participant in the ESOP, but a former employee of Aetna Plywood working at a competitor. At his deposition, Montgomery testified that he was immediately suspicious, primarily because he distrusted the people who ran the company and the ESOP. He was also suspicious that there would be a new appraisal because the $85.75 figure was within a "reasonable window" of the valuation that had been given for years. Montgomery apparently meant he was suspicious that a new appraisal would propose an even lower valuation; he did not testify that he was suspicious that the $85.75 valuation was too low.

The shares were purchased for $85.75 per share on June 12, 1992. No evidence is presented as to any further communications with the participants between April 24 and June 12. Neither is any evidence presented as to any communication after June 12 informing participants that the transaction had been completed. As mentioned in the April 24 letter, a current appraisal was obtained. Zweifler Financial Research's appraisal, dated June 1, 1992, values the stock at $85.00 per share. There is no evidence that participants were informed that the appraisal had been completed, nor any evidence that they were ever informed of the results of any

appraisal. The corporate board of Aetna Plywood did not approve the transaction until August 10, 1992, retroactive to June 12.[2] No evidence is presented as to when the ESOP trustees formally approved the transaction.

Counsel for Montgomery, now counsel for the class, obtained a copy of the Zweifler appraisal in February 1995. The present lawsuit was filed on May 30, 1995.

The parties agree that the following ERISA provision contains the applicable statute of limitations.

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

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2. Although not provided as part of the summary judgment motion, in response to the motion to amend, defendants provide a copy of a May 5, 1992 resolution of the Aetna Plywood board of directors "deem[ing] it to be in the best interests of the Corporation" to purchase the ESOP shares "at a price per share not less than $85.75." Again, there is nothing to indicate that this information was ever conveyed to any of the participants prior to May 27, 1992. Instead, since part of the document is redacted, presumably the document was treated as confidential and not disclosed to participants prior to the present litigation.

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

The principal issue to resolve is when plaintiffs had actual knowledge of the breach of fiduciary duty. Receipt of the April 24, 1992 letter was more than three years prior to the May 30, 1995 filing of this action. Defendants do not rely on any other event that may have occurred prior to May 27, 1992.[3] If actual knowledge occurred upon reading the April 24 letter, claims by participants who read that letter no later than May 26, 1992 would be untimely.[4]

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3. May 30, 1995 was the Tuesday after Memorial Day. Thus, filing on that date would also be timely for a limitation period that would otherwise have ended May 27, 28, or 29, 1995. Fed.R.Civ.P. 6(a).

4. The parties do not discuss what the effect would be of finding that named plaintiff had actual knowledge prior to May 27, 1992, while also finding that other members of the class did not have actual knowledge until later. As discussed in the opinion granting class certification, any participant may bring a claim for the entire amount of any undervaluation — this is not a case where each class member would have a distinct and separate claim for his allocable amount. *See* Montgomery v. Aetna Plywood, Inc., 1996 WL 189347 *3 (N.D.Ill. April 16, 1996). Since the undisputed facts show Montgomery did not have actual knowledge prior to May 27, 1992, this issue need not be resolved.

Appendix I

Constructive knowledge or suspicion is an insufficient basis for invoking § 1113(2); there must be "actual knowledge." Rush v. Martin Petersen Co., 83 F.3d 894, 896 (7th Cir.1996); Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1222 (7th Cir.1990). *See also* Wolin v. Smith Barney Inc., 83 F.3d 847, 853 (7th Cir.1996) (*dictum*).[5] "To charge [plaintiff] with actual knowledge of an ERISA violation, it is not enough that he had notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." Radiology, 919 F.2d at 1222 (quoting Brock v. Nellis, 809 F.2d 753, 755 (11th Cir.), *cert. dismissed,* 483 U.S. 1057, 108 S.Ct. 33, 97 L.Ed.2d 821 (1987)). "Actual knowledge" has been defined as "knowledge of the 'essential facts of the transaction or conduct constituting the violation.' " Rush, 83 F.3d at 896 (quoting Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir.1992)). However, "it is 'not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality.' " Id. Whether a fact is "essential" or just an additional detail "will usually turn in part on the complexity of the underlying factual transaction, the complexity of the legal claim and the egregiousness of the alleged violation." Martin, 966 F.2d at 1086.

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5. Although both parties cite to Wolin 's extensive discussion of § 1113, Wolin 's discussion of § 1113's actual knowledge requirement is actually *dictum*. Plaintiffs in that case conceded that they had actual knowledge in 1990, more than three years prior to the filing of the case. 83 F.3d at 853. The issue in Wolin was the application of the final clause of § 1113 as to the six years after discovery in the case of "fraud or concealment." *See* Wolin, 83 F.3d at 853-56. Plaintiffs in the present case do not rely on the "fraud or concealment" provision.

As stated in the statute, it is "knowledge of the breach or violation" that is key. 29 U.S.C. § 1113(2). *See also* Martin, 966 F.2d at 1086. Where the breach of duty precedes harm or injury, and there is actual knowledge of the breach, the statute still runs from the time of knowledge of the breach, not from the time the plaintiff gains actual knowledge of injury. Larson v. Northrop Corp., 21 F.3d 1164, 1171 (D.C.Cir.1994). *See also* Wolin, 83 F.3d at 853, 855 (*dictum*). Defendants argue that knowledge (acquired by reading the April 24 letter) that defendants were planning to engage in the challenged transaction starts the clock running because that is knowledge of the breach, whereas consummating the transaction on June 12 was merely the date injury occurred. The present case, however, is distinguishable from those cases where the breach preceded the harm. In Larson and Wolin, and the cases discussed therein, the statute began running when transactions, which constituted breaches of duty, were consummated. In those cases, injury followed at a later date when the investments involved in the transactions began to lose money. Here, no transaction was consummated until June 12.

Even if the decision to engage in a transaction at a future date can mark the beginning of the statutory period for a § 1104 or § 1106 violation,[6] reading the April 24 letter would not mark the beginning of the statutory period. The April 24 letter only informed participants who read it that the trustees were considering the transaction. There is no evidence that any plaintiff was informed, prior to May 27, 1992, that the

6. Section 1104 refers to an ERISA fiduciary "discharg[ing] his duties" with care and prudence. Section 1106 prohibits "caus[ing] the plan to engage in a transaction" that is prohibited.

trustees had approved the transaction. Also, the letter informed the participants that a price of $85.75 was being considered, but that another appraisal would be conducted before a price would be determined. The new appraisal is dated June 1 and there is no evidence that any participant was ever informed of the completion or results of the appraisal then or prior to that date. There can be no knowledge of a violation without knowledge of the actual transaction price. Selling the stock is not a violation; only selling the stock at a price below its fair value can constitute a violation. This is even true of the § 1106 violation, which contains an exception for self-dealing in employer securities as long as the sale is for "adequate consideration" and other requirements are satisfied. *See* 29 U.S.C. § 1108(e). Moreover, even if class members had knowledge by May 26, 1992 that the sale would be at the $85.75 price, there is no evidence that Montgomery or any other class member had knowledge that the shares were actually worth more. *Cf.* Harris Trust & Savings Bank v. Salomon Brothers, Inc., 1996 WL 341365 *19 (N.D.Ill. June 18, 1996). As the Zweifler appraisal and plaintiffs' complaints about it show, determining the value of the shares required certain knowledge of corporate assets and a certain level of analysis. There is no evidence that Montgomery, or any other class member, had such knowledge. To the contrary, Montgomery's deposition indicates it was his understanding in April 1992 that $85.75 was a fair value and he was afraid the ESOP shares would be repurchased at a lower price. Additionally, as to the § 1106 claim, the letter mentions the Davis family owned the other shares but does not mention that defendant Davis was one of the trustees or that he was participating in the ESOP's decision on the sale. While

Montgomery apparently was aware Davis was a trustee, there is no evidence that other class members also had such knowledge.

For the foregoing reasons, Montgomery and the other class members did not have actual knowledge of a breach of fiduciary duty prior to May 27, 1992. Therefore, their ERISA claims are not untimely pursuant to § 1113(2). It is therefore unnecessary to consider plaintiffs' alternative argument that there is also a derivative claim on behalf of the ESOP[7] and that only the six-year period can apply to that claim. *See* Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 338-39 (3d Cir.1984).

Plaintiffs move to amend their complaint to add a fiduciary duty claim under Delaware corporate law. They contend that defendants, as directors of Aetna Plywood, breached their fiduciary duties to shareholders by repurchasing the ESOP stock at a low price, thus favoring those shareholders (the Davis family) who owned the other stock. Defendants oppose the amendment on a number of grounds. They contend they would be unduly prejudiced by permitting an amendment at this time. They also contend that a cognizable claim is not stated because (a) the claim is untimely; (b) any injury to plaintiffs was caused by the sale of the shares (which was done by the trustees), not by the purchase of the shares; (c) there is no fiduciary duty owed to shareholders to repurchase stock at the highest possible price; and (d) no pre-filing demand was made on the directors as is required for a derivative suit.

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7. There has never been a determination that this case may proceed as a derivative action on behalf of the ESOP. *See* Montgomery, 1996 WL 189347 at *4.

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Defendants' contention that they would be unduly prejudiced by adding the claim this late in the litigation is without merit. The key issue will still be whether a fair price was paid for the shares. To the extent there are any pertinent facts regarding the directors' conduct not yet disclosed in discovery, they would be facts within the control of defendants. It would be plaintiffs who might be prejudiced by undisclosed facts, not defendants. No additional discovery will be permitted by plaintiffs.

It is alleged that the directors approved the purchase for the $85.75 price and that this price was less than the fair market value. It is also alleged that the trustees of the ESOP and directors of the corporation were the same people and that defendant Davis, one of the directors, was the one that benefitted from the transaction.

Defendants do not dispute that the amendment would relate back to the original filing of this action on May 30, 1995. Both sides agree that the three-year limitation period contained in 10 Del.Code § 8106 would apply. Defendants present a copy of a corporate resolution dated May 5, 1992 deeming it to be in the best interest of the corporation to repurchase the stock at a price no less than $85.75. As previously set forth, though, the transaction was not consummated until June 12, 1992, an action that was subsequently confirmed by the directors in a resolution dated August 10, 1992. The June 12, 1992 consummation of the sale, not the May 5, 1992 resolution, begins the running of the limitation period. *See* Dofflemyer v. W.F. Hall Printing Co., 558 F.Supp. 372, 379 (D.Del.1983) (statute on breach of fiduciary duty claim began to run when merger was

consummated, not when directors took prior action); Kaufman v. Albin, 447 A.2d 761, 763-64 (Del.Ch.1982) (statute on breach of fiduciary duty claim began to run when tender offer was accepted, not at earlier date when directors passed resolution approving tender offer). The May 30, 1995 filing of this action was within three years after the June 12, 1992 completion of the transaction.

Defendants also challenge the claim on its merits.

> When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. . . . The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.

Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del.1993) (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del.1983)). The directors have a duty to abstain from unfairly favoring certain shareholders over other shareholders. Id. at 1375-76. This duty is owed directly to the shareholder. Alta Health Strategies, Inc. v. Kennedy, 790 F.Supp. 1085, 1096-97 (D.Utah 1992). Particularly where the directors have more pricing information than the shareholders or where self-dealing is involved, it will be a breach of fiduciary duty to repurchase stock for other than the fair market value, absent a good faith belief that the price represented fair market value. *Id.;* Nixon, 626 A.2d at 1375-76. *See also* Polk v. Good, 507 A.2d 531, 536-37 (Del.1986).

Appendix I

Since, according to the allegations, the transaction involved favoring certain shareholders, including one of the directors, over the ESOP and purchase of the ESOP shares for substantially less than fair market value, a violation of fiduciary duty is stated. Since the duty is owed directly to the shareholder, the claim need not be brought as a derivative action on behalf of the corporation. Therefore, plaintiffs were not required to make a pre-filing demand upon the directors. To the extent the claim is derivative as to the ESOP, a pre-filing demand was made upon defendants as trustees.

Leave to file the amended complaint will be granted. Apparently for purposes of consistency in numbering or otherwise, the amended complaint again includes the Count III unjust enrichment claim that was previously dismissed. That claim will be dismissed again.

IT IS THEREFORE ORDERED that defendants' motions for summary judgment [163, 167] are denied. Plaintiffs' motion for leave to file their third verified amended complaint [168] is granted. Count III of the third verified amended complaint is dismissed. Defendants shall answer the remaining allegations of the third verified amended complaint by January 3, 1997. In open court on January 27, 1997 at 9:15 a.m., the parties shall submit an original and copy of a joint final pretrial order in full compliance with Local Rule 5.00.

APPENDIX J — MEMORANDUM OPINION AND ORDER AND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 16, 1996, AND JULY 2, 1996, RESPECTIVELY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 3193

HOWARD R. MONTGOMERY, for Himself and For All Others Similarly Situated and for Aetna Plywood, Inc. Profit Sharing Plan, as Successor to Aetna Plywood, Inc. Employee Stock Ownership Plan, Nominal Defendant,

Plaintiff,

v.

AETNA PLYWOOD, INC., a Delaware Corporation, JEFFREY DAVIS, a Trustee of Aetna Plywood, Inc., JOHN FRANCIONE, a Trustee of Aetna Plywood, Inc., PETER JOHN, a Trustee of Aetna Plywood, Inc., and PETER THOMSEN, a Trustee of Aetna Plywood, Inc.,

Defendants.

April 16, 1996
Opinion on Reconsideration Jul. 2, 1996

Appendix J

MEMORANDUM OPINION AND ORDER

HART, District Judge.

This is a putative class action brought by named plaintiff Howard Montgomery, a former employee of defendant Aetna Plywood, Inc. ("Aetna Plywood"). It is claimed to be on behalf of the putative class members themselves and for Aetna Plywood, Inc. Profit Sharing Plan (the "Plan"), as successor to nominal defendant Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP"). In addition to Aetna Plywood, the named defendants are four trustees of the ESOP, including Jeffrey Davis, who owns 100% of the stock of Aetna Plywood. Two of the trustee defendants, Davis and John Francione, are also alleged to be current trustees of the Plan.[1]

Plaintiff claims that the ESOP formerly owned approximately 95% of Aetna Plywood's outstanding stock and Davis approximately 5%. In June 1992, Aetna Plywood repurchased all of the ESOP's stock, making Davis the owner of 100% of Aetna Plywood's outstanding stock. The proceeds of the sale were transferred to the Plan, to be placed in more diverse investments for the participants' benefit. Montgomery claims that Aetna Plywood paid less than fair market value for the ESOP's shares and that the ESOP's trustees violated their fiduciary duties by accepting the low price. The putative class is the ESOP participants as of the time of the repurchase of the stock. Presently pending are

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1. The four trustees apparently are sued in their individual capacities.

a motion for class certification and a motion to file a Second Amended Complaint adding a securities fraud claim.[2]

The First Amended Complaint contains two counts,[3] all of them pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Count I is a claim for breach of fiduciary duty in violation of 29 U.S.C. §§ 1104 and 1109. Count II is a claim that the sale of the stock was a prohibited transaction in violation of 29 U.S.C. §§ 1106(a), 1106(b), and 1109. The proposed Second Amended Complaint seeks to add Count IV, a securities fraud claim pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5. Defendants oppose the motion to amend on the grounds that the securities claim is futile because the transaction is not covered by the pertinent securities laws, it is not within the statute of limitations, and the named plaintiff did not actually rely on the allegedly fraudulent representation. They also contend that the motion to amend is too late because it comes too close to the close of discovery.

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2. Defendants' motion to file a surreply is granted. Plaintiff's motion to strike defendants' response to plaintiff's supplemental memorandum is denied, but the arguments contained in that motion will be considered. Also, absent class members seek to intervene to file objections to class certification. The putative intervenors do not raise any arguments not otherwise raised by defendants, but their brief has been considered. Plaintiff's motion to strike those objections is denied.

3. There was also a Count III claim for unjust enrichment which has previously been dismissed.

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The alleged misrepresentations were contained in an April 24, 1992 letter advising ESOP participants of the impending transaction and requesting that they express their opinions as to whether they favored it, opposed it, or wanted the ESOP committee to decide. The alleged misrepresentations in the letter are: (1) there would be a more current valuation as of the date of the transfer (but the sales price had already been set); (2) the company would borrow money to repurchase the stock (but financing had already been arranged); (3) the owners of the remaining stock would be the Davis family (but Jeffrey Davis was to be the sole owner); (4) the investment plan that the proceeds would be placed in had, in the past, outperformed the increase in value of the stock (but this comparison was based on book value of the stock, not its fair market value); and (5) shares would be distributed on October 31, 1992 following a final valuation (but the shares were distributed in June 1992 and no final valuation was performed). Plaintiff also claims that defendants failed to disclose certain details about the transaction that the securities laws require be disclosed when a person will have more than 5% of a class of stock. *See* 15 U.S.C. §§ 78m(d)(1), 78n(d).

Under Fed. R. Civ. P. 15(a), leave to amend is to "be freely given when justice so requires." Leave to amend, however, "may be denied where there is undue delay, bad faith, dilatory motive, a repeated failure to cure deficiencies, undue prejudice to the opponent, or where the amendment would be futile." Bower v. Jones, 978 F.2d 1004, 1008 (7th Cir. 1992). Accord Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1298 (7th Cir. 1993). An amendment is futile "when it fails to state a valid theory of liability or could not withstand a motion to dismiss." Bower, 978 F.2d at 1008.

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The Seventh Circuit has held that a beneficiary of a trust can satisfy the prudential standing requirements to bring a securities fraud claim based on securities purchased or sold for the trust. See O'Brien v. Continental Illinois National Bank & Trust Co. of Chicago, 593 F.2d 54, 59 (7th Cir. 1979); Norris v. Wirtz, 719 F.2d 256, 259 (7th Cir. 1983), *cert. denied,* 466 U.S. 929 (1984). However, no claim under the federal securities law can be made by the beneficiary against the trustee where full discretion to make investment decisions is granted to the trustee. O'Brien, 593 F.2d at 59-61; Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co., 800 F.2d 177, 181-82 (7th Cir. 1986); Ray v. Karris, 780 F.2d 636, 640-41 (7th Cir. 1985). Under such circumstances, the real dispute is not a violation of federal securities laws, but whether the trustee violated fiduciary duties — generally a state law claim, though here a federal claim because of the applicability of ERISA. This rule only applies if the trustee has full discretion over investment decisions; if the beneficiary retains at least some significant control over the investment decisions, a federal securities claim is still possible. Norris, 719 F.2d at 260.

Plaintiff contends in his brief that the ESOP participants retained the right to "quasi-approval" of the ESOP's sale of the stock. There is no contention that any ESOP document provided the beneficiaries with any right of approval. Instead, plaintiff points to the fact that the ESOP committee sought the participants' approval. The fact that the participants' views were solicited, however, did not give them the right of approval. Moreover, the form sent by the committee does not ask for the participants' approval. The April 24, 1992 letter states the committee "would like any *input* and/or

opinions" concerning the transaction then under consideration by the committee and refers to the attached form as a "survey form." The response form itself is labeled as an "opinion form," with the choices to check being: in favor, opposed, or prefer committee to decide. There are also lines to note down any comments. Since plaintiff does not allege any facts or make any contentions showing that the trustees had other than full discretion to make the decision to sell the stock back to Aetna Plywood, there can be no claim under the federal securities law.[4] Permitting plaintiff to amend the complaint would be an exercise in futility. The motion for leave to file the Second Amended Complaint will be denied.

ERISA provides: "A civil action may be brought — . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2).

Section 1109 concerns breaches of fiduciary duty and provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have

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4. Since the claim otherwise fails, there is no need to consider defendants' contentions regarding timeliness, reliance, and prejudicial delay.

> been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .

29 U.S.C. § 1109(a).

Counts I and II allege violations of two provisions of the subchapter that impose duties on fiduciaries. Count I alleges a violation of § 1104(a)(1) which requires investments be made in the interests of the participants and beneficiaries and in a prudent manner. It provides in part:

> (1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries . . .;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; . . . .

29 U.S.C. § 1104(a)(1).

Count II is based on alleged violations of § 1106's prohibition against certain self-dealing transactions.

> (a) Except as provided in section 1108 of this title:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
> >
> > > (A) sale or exchange of . . . any property between the plan and a party in interest;
> >
> > * * *
> >
> > > (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;
> >
> > * * *

(b) A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

. . . .

29 U.S.C. § 1106.

Plaintiff's only claims are pursuant to § 1109. Section 1132(a)(2) permits individual participants or beneficiaries to bring such claims. Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140 (1985). However, the only relief that may be obtained for violations of § 1109 is relief on behalf of the plan. Id. at 140-44; Varity Corp. v. Howe, 116 S. Ct. 1065, 1079 (1996);[5] Anweiler v. American Electric Power Service Corp., 3 F.3d 986, 992 (7th Cir. 1993). Therefore, whether pursued individually or on behalf of a class, plaintiff could obtain the same relief, reimbursement to the ESOP (through the current Plan) for the entire amount, if any, that the ESOP was underpaid for the stock. However, as a prudential matter, the Seventh Circuit has held that this type of action should be pursued as either a class action or derivative action, in order to avoid inconsistent rulings and to ensure the interests of the beneficiaries are adequately represented. Thornton v. Evans, 692 F.2d 1064, 1080 (7th

5. The parties cite Varity for the proposition that individual relief can be obtained for breaches of fiduciary duty. That case, however, concerns breaches that directly aggrieve an individual participant or beneficiary and do not fall under § 1109, not claims for mismanagement of funds which expressly fall within the purview of § 1109.

Cir. 1982).[6] See also Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1461-63 (9th Cir.), *cert. denied,* 116 S. Ct. 301 (1995); Gruby v. Brady, 838 F. Supp. 820, 827 (S.D.N.Y. 1993); Mertens v. Kaiser Steel Retirement Plan, 744 F. Supp. 917, 920-22 (N.D. Cal. 1990), *aff'd,* 948 F.2d 1105 (9th Cir. 1991); Diduck v. Kaszycki & Sons Contractors, Inc., 737 F. Supp. 792, 799 (S.D.N.Y. 1990), *aff'd in part, rev'd in part on other grounds,* 974 F.2d 270 (2d Cir. 1992).

The parties agree that Fed. R. Civ. P. 23.1 and 23.2 are inapplicable to this case since neither the Plan nor the ESOP are a corporation or unincorporated association, which are the only types of entities to which that rule applies. Kayes, 51 F.3d at 1463. While derivative actions other than pursuant to Rule 23.1 or 23.2 may be possible, *see id.;* Mertens, 744 F. Supp. at 922-23, it will first be considered whether this is an appropriate case for class certification. Since class certification is found to be appropriate, it is unnecessary to consider whether the case could otherwise be pursued as a derivative action.

In order to be certified as a class action, all the requirements of Rule 23(a) must be satisfied as well as at least one of the subsections of Rule 23(b). The proposed class is: all participants in the ESOP as of the June 1992 repurchase of the shares, except defendants.

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6. Thornton also indicates that the derivative action requirement of first demanding that the trustees pursue the action should be followed. Plaintiff alleges in his complaint that such a demand was made of the trustees of the Plan without success and further pursuit of that avenue would be futile. Defendants do not factually dispute those allegations.

There are approximately 100 class members. This is a large enough class to satisfy the numerosity requirement of Rule 23(a)(1) and defendants do not contend otherwise.

Whether defendants breached their fiduciary duties and whether the price at which the shares were repurchased was a fair price involve questions of law and fact common to the class. Rule 23(a)(2) is satisfied.

The typicality requirement of Rule 23(a)(3) is satisfied if the named plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993) (quoting De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)). That requirement is satisfied here. Cf. Gruby, 838 F. Supp. at 827-28.

Defendants object that named plaintiff and his counsel do not satisfy the Rule 23(a)(4) requirement of adequate representation of the class. Defendants contend named plaintiff's interests are in conflict with others in the proposed class in that plaintiff is a former employee while many others in the class are still employed by Aetna Plywood.[7] Defendants contend this creates a conflict because current employees have an interest in the company remaining viable so it can keep employing them and that they also have an interest in

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7. Defendants assert in their brief, without support but also without objection, that 68.1% of the proposed class are still employed by Aetna Plywood.

maintaining profits that in part determine current and future contributions on their behalf into the Plan.[8] Defendants also contend the conflicting interests are exacerbated by the fact that named plaintiff now owns a competing company. Defendants contend named plaintiff and another person who allegedly instigated the litigation therefore have an interest in putting Aetna Plywood out of business to eliminate it as a competitor. Defendants also contend plaintiff's counsel is not competent to handle this litigation.

Defendants provide insufficient support for their contention that this lawsuit potentially threatens the viability of Aetna Plywood. They only point to the alleged fair value of the shares contained in the complaint (a number defendants otherwise characterize as "incredulous") and contend the resulting $11,241,856 of damages that would be calculated based on that value is a large sum that would put Aetna Plywood out of business or at least hamper its cash flow such that layoffs might be required. Even assuming maximum liability, defendants point to no current financial information to establish how this would affect the company. Moreover, defendants ignore who may be required to pay any damages that are won. Plaintiff points to discovery documents that Aetna Plywood has a fiduciary insurance policy that covers the present lawsuit.[9] Also, the trustee defendants (or perhaps an insurer for them) may be required

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8. No Plan documents are provided to establish what, if any, portion of current and future contributions are based on actual profits of Aetna Plywood.

9. The document provided does not specify the amount or type of coverage.

to pay a substantial portion of any damages, including defendant Davis who allegedly used the transaction as an opportunity to withdraw substantial amounts of cash from the company. It has not been shown that there is a significant risk of job loss for the current employees. Neither has it been shown that there is a significant risk that any decrease in profit sharing contributions would be greater than the benefits of this lawsuit.

It has not been shown that any significant conflict exists between current and former employees who are both members of the proposed class. It is not unusual for certified classes to contain current and former employees. See Probe v. State Teachers' Retirement System, 780 F.2d 776, 781 (9th Cir.), *cert. denied,* 476 U.S. 1170 (1986); Becher v. Long Island Lighting Co., 164 F.R.D. 144, 152 (E.D.N.Y. 1996); Walsh v. Northrop Grumman Corp., 162 F.R.D. 440, 447-48 (E.D.N.Y. 1995); Gruby, 838 F. Supp. at 827; Robertson v. National Basketball Association, 389 F. Supp. 867, 898-99 (S.D.N.Y. 1975). In the present case, it is still in all class members' interest to prove that the violation occurred and to obtain maximum relief. There is nothing to indicate that named plaintiff is opposed to this common goal. No conflicts are shown that would preclude named plaintiff from being an adequate representative. *Cf.* Probe, supra; Becher, supra; Gruby, supra.

Defendants also contend that named plaintiff's deposition shows a lack of knowledge of and lack of interest in the suit. Plaintiff, however, points to other deposition testimony showing he has knowledge of the essential aspects

of the case. He need not know all the details. Named plaintiff is sufficiently aware of the case to show he is an adequate representative.

Defendants also contend that plaintiff's counsel is inadequate. Defendants point to two cases in which counsel received less fees than he had requested. In one of those cases sanctions were imposed and counsel was found in contempt for having failed to pay the sanctions. Recently the sanctions themselves were vacated and remanded for further hearing. See Retired Chicago Police Association v. City of Chicago, 76 F.3d 856, 868-69 (7th Cir. 1996). The contempt finding was upheld.[10] *See id.* at 869-70. The cases cited by defendants have been considered. It is also considered that counsel has been involved in a number of class actions, many involving pension benefits. He has won substantial money damages in a number of them. Also, the briefs he has filed in this case and the oral presentations he has made during the frequent court appearances this case has generated show that counsel is capable of representing the class.

Named plaintiff and his counsel are found to be adequate to represent the class. Rule 23(a) is satisfied.

Still to be considered is Rule 23(b). Thornton, 692 F.2d at 1080, supports that a primary concern in this type of suit is to avoid inconsistent determinations. Since the relief sought is for the ESOP as a whole, multiple adjudications

10. The Seventh Circuit did not reach the merits of the contempt issue, holding that the arguments made on appeal had been waived. The sanctions were vacated based on procedural irregularities, not based on the merits of imposing sanctions.

could produce inconsistent results placing inconsistent obligations upon defendants. Certification pursuant to Rule 23(b)(1)(A) is appropriate. Becher, 164 F.R.D. at 153; Gruby, 838 F. Supp. at 828; Diduck, 737 F. Supp. at 799. This is not the type of case in which an opt-out class would be appropriate; permitting individual plaintiffs to opt out could result in inconsistent determinations. Diduck, 737 F. Supp. at 799.

This is a case, however, where the class should be notified of the pendency of the action and absent members given the opportunity to present their views. See Mertens, 744 F. Supp. at 921. Therefore, the parties will be required to send a Rule 23(c)(2) type notice, though not containing the opt-out provision. The notice shall advise the class members of the nature of the suit; the parties involved; the name, address, and phone number of class counsel; that all class members will be bound by the judgment, whether favorable or not; and of the option to seek individual representation and to move to intervene. If they have not already, defendants shall promptly provide plaintiff with a list of the class members. By April 23, 1996, plaintiff shall file his proposed notice to the class.

IT IS THEREFORE ORDERED that:

(1) Absent class members' motion for invitation to object to certification [60] is granted in part and denied in part. Absent class members are granted leave to file their objections. Plaintiff's motion to strike the objections [61] is denied.

(2) Defendants' motion to file surreply [111] is granted. Plaintiff's motion to strike defendants' response to the supplemental memorandum [112] is denied.

(3) Plaintiff's motion to file second amended complaint [90] is denied.

(4) Plaintiff's motion for class certification [26] is granted. A class is certified consisting of the following persons: All participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") as of the June 1992 sale of the ESOP's shares of Aetna Plywood, Inc. to Aetna Plywood, Inc., excluding all defendants.

(5) By April 23, 1996, plaintiff shall file his proposed notice to the class.

Appendix J

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

July 2, 1996

In this class action, former participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") claim that defendants breached their fiduciary duties when defendant Aetna Plywood, Inc. ("Aetna Plywood") repurchased its stock from the ESOP for an allegedly undervalued price. The claims are pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), specifically 29 U.S.C. § 1104, 1106, and 1109. In an order dated April 15, 1996, class certification was granted and leave to amend the complaint to add a securities fraud claim was denied. *See* Montgomery v. Aetna Plywood, Inc., 1996 WL 189347 (N.D. Ill. April 16, 1996). Plaintiffs seek reconsideration of the denial of leave to amend and defendants seek reconsideration of class certification. Familiarity with the April 15 Ruling is presumed.

Leave to amend to add a securities fraud claim was denied based on lack of standing. Consistent with Seventh Circuit precedents, it was held that plaintiffs lacked standing under federal securities laws because trustees of the ESOP had full discretion to make investment decisions for the ESOP. Plaintiffs now contend there was a provision of the ESOP, not previously provided to the court, that required participants' approval for the trustees' sale of the stock back to Aetna Plywood. That provision reads:

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D. *Voting Company Stock.* All shares of Company Stock shall be voted by the Trustee at such time and in such manner as the Committee shall direct; provided, however, that, if the Committee instructs the Trustee to execute a proxy in favor of one or more of the members of the Committee, the Trustee shall comply with said instruction and the proxy shall be voted as the Committee shall direct. If the Committee shall fail or refuse to give the Trustee timely instructions as to how to vote any Company Stock which the Trustee otherwise has the right to vote, the Trustee shall not exercise its power to vote such Company Stock. However, as to any matter which involves the approval or disapproval of any corporate merger or consolidation, recapitalization, reclassification, liquidation, dissolution, sale of substantially all assets of a trade or business or similar transaction, each Participant shall have the right to direct the voting of any Company Stock allocated to his Company Stock Account. In such event, the Committee shall be responsible for obtaining the instructions from each Participant as to the exercise of such voting rights and shall notify the Trustees of such instructions. Upon receipt of such instructions, the Trustee shall either so exercise such voting rights or, if so instructed by the Committee, execute a proxy in accordance with the instructions of the Committee. In either case, the Trustee shall incur no liability in connection therewith so long as the Trustee complies with such instructions.

The existence of this provision has no effect on the prior ruling. It was previously held that "no claim under the federal securities law can be made by the beneficiary against the trustee where full discretion to make investment decisions is granted to the trustee." 1996 WL 189347 at *2. The above quoted clause does not give the beneficiaries control over the ESOP Trustees' investment decisions. It only pertains to the beneficiaries' rights to vote on certain actions of Aetna Plywood, not investment decisions of the ESOP.[1] Since there is no showing that the ESOP Trustees lacked full discretion to make investment decisions for the ESOP, there is no basis for granting reconsideration as to the denial of leave to add a securities fraud claim. Whether any failure of the trustees to protect and extend the beneficiaries' voting rights is actionable under ERISA or admissible in the present case is another question. Plaintiffs' motion for partial reconsideration will be denied.

Defendants move for reconsideration of the grant of class certification or, alternatively, for certification of an interlocutory appeal. Defendants complain that the prior ruling improperly presumes class certification is appropriate and instead places the burden on defendants to show this is not an appropriate case for class certification. Named plaintiff, however, satisfied his burden of showing that he and his counsel were adequate representatives. Therefore, there was no reason to find otherwise unless defendants or the intervenors submitted information showing a conflict or other inadequacy.

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1. Since the clause does not pertain to investment decisions, it is unnecessary to consider defendants' contention that the provision is unenforceable because inconsistent with ERISA. Cf. Central Trust Co. v. American Avents Corp., 771 F.Supp. 871, 874-75 (S.D.Ohio 1989).

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It was and is undisputed that named plaintiff now works for a company that competes with Aetna Plywood. Defendants complained that this was a conflict because named plaintiff had an incentive to drive Aetna Plywood out of business whereas many of the class members are still employed by Aetna Plywood and have an interest in its continued vitality. It was unnecessary to consider that possible conflict because there was no evidence showing Aetna Plywood's continued vitality was actually threatened. On reconsideration, defendants still do not point to any such evidence.

But even assuming it is true that Aetna Plywood's vitality is threatened by this lawsuit, preserving jobs would not be a proper consideration. As class representative in this case, Montgomery represents a class of profit sharing beneficiaries, not a class of employees. Just as ESOP trustees would commit a fiduciary violation if they placed preserving jobs for employees ahead of maximizing benefits for the ESOP's beneficiaries, see Shoen v. AMERCO, 885 F.Supp. 1332, 1348 (D.Nev.1994); Central Trust Co., N.A. v. American Avents Corp., 771 F.Supp. 871, 874 (S.D.Ohio 1989); Danaher Corp. v. Chicago Pneumatic Tool Co., 635 F.Supp. 246, 250 (S.D.N.Y.1986), the class representative in the present case must be a person who will seek to maximize ESOP benefits for the class. There is no contention that Montgomery and his counsel are inadequate for that purpose. Defendants' motion for reconsideration will be denied.

The ruling on class certification is not an appropriate issue for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is not a controlling question of law and an

immediate appeal will not materially advance the ultimate termination of this litigation. See Bates v. Tenco Services, Inc., 132 F.R.D. 165 (D.S.C.1990); In re Folding Carton Antitrust Litigation, 75 F.R.D. 727 (N.D.Ill.1977).

As required by the April 16 Ruling, plaintiffs submitted a proposed notice to the class. Defendants have presented some objections. Attached as Exhibit A, is the form of notice that should be sent out.[2] The notices shall be mailed within three weeks of the date of this ruling.

Plaintiffs seek to compel the production of valuation reports prepared by consultants. Defendants have submitted *in camera* two valuation reports prepared by consultants and consulting agreements or proposals prepared by those two consultants and four others, all of whom are not to be called as witnesses by defendants. The documents submitted support that the valuations were produced in anticipation of litigation and that the consulting agreements were solicited in anticipation of litigation. These documents are protected by the work product privilege. See Fed.R.Civ.P. 26(b)(3); Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 139 F.R.D. 609, 615 (E.D.Pa.1991). Plaintiffs' motion to compel will be denied.

Plaintiffs requested "all budgets, forecasts or business plans for Aetna Plywood, Inc. prepared in 1990, 1991, and 1992." Defendants responded there were no such documents. Plaintiffs move to compel relying on another case in which Aetna Plywood is involved in which documents labeled as

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2. The layout may be modified to conform with printing requirements; the language shall not be changed.

"projections" were disclosed. Defendants respond that those documents are not really projections and, in any event, projections are not budgets, forecasts, or business plans. Defendants provided *in camera* a number of documents that were labeled as projections and also represent that all pertinent documents have been disclosed. To the extent any of the documents submitted in camera have not yet been disclosed, they shall be disclosed within 7 days.

Defendants may have been playing a semantical game with plaintiffs by contending projections are not "forecasts." However, no sufficient basis is found for imposing sanctions.

Plaintiffs complain that defendants' counsel has been contacting class members regarding the case. Defendants contend there has been no postcertification contact of class members by their counsel, but they request permission to initiate such contacts. Defendants also seek to limit plaintiffs' counsel's contact with class members.

Once a class action has been certified, as has this case, counsel for the plaintiff class is considered to be the representative of all class members who have not chosen to be represented by other counsel and the ethical prohibitions against counsel for one party directly communicating with the other party are in force. Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1206-07 & n. 28 (11th Cir.1985); Resnick v. American Dental Association, 95 F.R.D. 372, 376-77 (N.D.Ill.1982); Bower v. Bunker Hill Co., 689 F.Supp. 1032 (E.D.Wash.1985); Haffer v. Temple University of Commonwealth System of Higher Education, 115 F.R.D. 506, 513 (E.D.Pa.1987); Tedesco v. Mishkin, 629 F.Supp.

1474, 1483 (S.D.N.Y.1986); Georgine v. Amchem Products, Inc., 160 F.R.D. 478, 495 n. 26 (E.D.Pa.1995), *vacated on other grounds,* 83 F.3d 610 (3d Cir.1996); *Manual for Complex Litigation* § 30.24 at 234 (3d ed. 1995) ("Manual"); N.D. Ill. Rules of Professional Conduct 4.2. See also Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n. 21 (1981); Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 712 (7th Cir.1986). Citing Gulf Oil, defendants contend their First Amendment rights would be infringed. Unlike the present case, however, Gulf Oil involved communications by plaintiff counsel (that is the putative class members' potential counsel, not the putative class members' potential opposing counsel) and also involved communications prior to certification. That is a different circumstance than the present case. See Union Carbide, 782 F.2d at 712. A number of courts have specifically considered the type of situation in the present case and hold that a prohibition on opposing counsel communicating with members of a certified class does not violate the First Amendment. *See* Kleiner, supra; Resnick, supra; Bower, supra; Haffer, supra.

Defendants' counsel will be prohibited from contacting members of the class regarding this litigation absent the consent of counsel for the class member.[3] As stated, the prohibition only applies to communications regarding the litigation. There is no prohibition on other communications, including communications necessary to conduct the daily business of Aetna Plywood. Defendants contend there will

3. To the extent any class member chooses to be represented by an attorney other than those representing the named plaintiff, defense counsel would need the permission of that counsel, not named plaintiff's counsel.

be a need to communicate with certain employees in order to prepare its case. Defendants have not specifically identified any such employees nor have they specifically identified their need. They also have not indicated that they sought permission for such communications and were turned down by plaintiffs' counsel. No sufficient showing has been made to presently grant any exception. If the need for such communication arises, defense counsel may seek leave of court for such communications, but only after first seeking permission from the class member's counsel. Counsel for the class member shall be reasonable in considering such requests. Also, if a motion before the court is necessary, a specific and particularized need must be shown.[4]

As for plaintiffs' attorneys' contact with their own clients, defendants complain that the attorneys may attempt to communicate with class members regarding additional litigation. That, however, is no basis for prohibiting contact. That is precisely the type of communication that Gulf Oil holds is protected by the First Amendment absent a clear and particularized showing of a need for prohibition. Defendants have not made any such showing.

Defendants also seek to prohibit plaintiffs' counsel from contacting senior management officials who are members of the class. That does involve potential problems. *Cf. Manual,* § 30.24 at 234. It is doubted that plaintiffs' counsel has a great need to contact such members of the class,

4. Although not discussed in their motion, in their request for relief plaintiffs seek to have defendants "turn over to class counsel all information obtained from class members." Since not argued, that request is denied.

particularly since discovery is already closed. Moreover, until such a need might arise, it is unnecessary to determine the appropriateness of any such contact. It is not being determined that plaintiffs' counsel is prohibited from contacting such employees. However, no such contact shall be made without first seeking leave of court to do so.[5]

Also pending are three motions by plaintiffs for leave to conduct further discovery. The motions overlap and are in part moot. Plaintiffs generally do not explain why they need any particular discovery that they have requested. Primarily, they seek information as to what Davis did with money he received from Aetna Plywood. While such information may be important for purposes of collecting any judgment that plaintiffs may obtain, it is not pertinent to either liability or damages. Plaintiffs do not contend that the corporation's records are inadequate to determine what amounts were distributed to Davis. What Davis did with that money and how he may have reported it on his tax returns is neither relevant to plaintiffs' claims nor likely to lead to the discovery of admissible evidence. Discovery will not be reopened for purposes of obtaining Davis's tax returns nor records of his checking accounts. Also, discovery will not be reopened to permit plaintiffs to depose Len Borhart regarding Davis's personal finances.

Plaintiffs also seek to depose Borhart regarding his role as Aetna Plywood's accountant. Plaintiffs do not specify what questions they may have other than regarding a

5. Neither party proposed any definition of "senior management." It is assumed plaintiffs recognize who would be considered to fall within that category.

document that does not exist. Plaintiffs have not made an adequate showing to reopen discovery for purposes of deposing Borhart.

Plaintiffs seek certain projections of Jay Frischkorn. To the extent these have not already been provided to plaintiffs, defendants shall provide them within 7 days after the date of this order. To the extent plaintiffs still seek to depose Frischkorn, that aspect of the motion is denied since it has not been shown why that would be necessary.

Plaintiffs seek to depose Annette Drago regarding a conversation she claims to have overheard between Davis and an ESOP consultant. At his deposition, Davis denied remembering any such conversation. Drago is a member of the class in the present case, but also is engaged in litigation against Aetna Plywood and Davis regarding the termination of her employment with Aetna Plywood. Counsel for plaintiffs learned of the overheard conversation shortly before discovery closed because it was mentioned in the recently filed complaint of Drago. Plaintiffs also seek Davis's telephone records to show who he spoke to on the day of the alleged conversation. There is no need to depose Drago. Since she is a member of the class, counsel for the class is free to interview her.[6] At this point, discovery will not be reopened for purposes of seeking possible corroboration in telephone records.

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6. Since defendants object to permitting her deposition, they cannot complain that they have no opportunity to learn what she may have to say.

The May 16 motion mentions the possibility of needing to depose persons at banks from which Aetna Plywood sought loans. No specific persons having been identified, it is assumed that this issue became moot after the documents were obtained and the motion is denied.

IT IS THEREFORE ORDERED that:

(1) Plaintiffs' motion for partial reconsideration of order denying plaintiffs to amend their complaint to add a securities law claim [129-1] is denied.

(2) Defendants' motion to reconsider order certifying class [127-1] and alternative motion for a 28 U.S.C. § 1292 finding [127-2] are denied.

(3) Defendants' motion to stay notice [125-1] is denied. Within three weeks after today's ruling, plaintiffs shall mail notice to the class in the form stated herein.

(4) Plaintiffs' motion to compel valuation reports based on new information [131-1] is denied.

(5) Plaintiffs' motion to compel based on new information [132-1] is granted in part and denied in part. Within 7 days, defendants shall disclose any "projection" documents not previously provided to plaintiffs. Plaintiffs' motion to impose sanctions on defendants' counsel for improperly withholding requested documents [132-2] is denied.

(6) Plaintiffs' motion to enjoin defendants' counsel from directly contacting class members [135-1] is granted.

Appendix J

Defendants' counsel shall not contact any member of the class regarding this litigation without obtaining permission of the class member's counsel or leave of court if counsel's permission is denied. Defendants' motion to enjoin plaintiffs' counsel from contacting current employees is denied in part and denied in part without prejudice. Plaintiffs' counsel must seek leave of court before contacting senior management officials of Aetna Plywood.

(7) Plaintiffs' motion to extend discovery period to depose certain key witnesses [134-1] is denied in part and granted in part. Within 7 days, defendants shall provide plaintiffs with Frischkorn's projections. Plaintiffs' motion for leave to depose key witnesses [148-1] is denied. Plaintiffs' motion to open discovery in order to depose newly discovered third parties and to request defendants to produce documents [154-1,2] is denied.

(8) In open court on August 13, 1996 at 9:15 a.m., the parties shall submit an original and copy of a topbound final pretrial order in full compliance with Local Rule 5.00.

Appendix J

NOTICE OF CLASS ACTION

This notice may affect your rights.

Please read carefully.

THIS IS NOTICE OF LITIGATION BEING PURSUED FOR THE CLASS OF WHICH YOU ARE BELIEVED TO BE A MEMBER. YOU ARE NOT BEING SUED.

To: All Participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") as of the June 1992 sale of the ESOP's shares of Aetna Plywood, Inc. to Aetna Plywood, Inc., excluding all Defendants.

EXHIBIT A

Your rights may be affected by a lawsuit pending in the United States District Court for the Northern District of Illinois, Civil Action No. 95 C 3193. Plaintiff, Howard R. Montgomery, charges that Aetna Plywood, Inc., Jeffery Davis, John Francione, Peter John, and Peter Thomsen (the "Defendants") breached their fiduciary duties by effecting or approving the 1992 sale of the ESOP's Aetna Plywood shares to Aetna Plywood, Inc., for a price below their fair market value. The Defendants deny these charges and state that the entire transaction was fair and in the best interests of the ESOP participants.

The Court has not ruled on the merits of Mr. Montgomery's charges or on the denials and other defenses

made by the Defendants. The purpose of this notice is to advise you (who have been identified as possibly a participant in the ESOP in June 1992) of these events and of your rights.

CLASS ACTION RULING

The Court has certified the case as a class action for the benefit of the participants in the ESOP with Howard R. Montgomery (the "named plaintiff") as representative of the class and his attorney, Clinton A. Krislov & Associates, Ltd., as counsel for the class. The class consists of:

> All participants in the Aetna Plywood, Inc. Employee Stock Ownership Plan (the "ESOP") as of the June 1992 sale of the ESOP's shares of Aetna Plywood, Inc. to Aetna Plywood, Inc., excluding all Defendants.

The decision of the Court that this lawsuit should proceed as a class action does not mean that the Court has ruled on the merits of the class's claims. The Court's decision does not mean that any money or other relief will be obtained for the class, because these are contested issues that have not been decided. Rather, the ruling simply means that the final outcome of this lawsuit — whether favorable to the Plaintiffs or the Defendants — will apply in like manner to you and every other member of the class.

If you are a member of the class, you need take no action to retain that status. Any recovery obtained on your behalf will be credited to your account in the Aetna Plywood, Inc. Profit Shares Plan, based on the proportionate interest of your account in the Profit Sharing Plan. If any recovery is

obtained, the recovery may be reduced by an award of attorney's fees to class counsel. If you wish to participate directly in this action, you may do so with independent counsel, whose expenses you may be required to pay subject to your agreement with that counsel and any possible statutory fee award.

ADDITIONAL INFORMATION

Any questions you have concerning the matters contained in this notice (including any corrections or changes of name and address) should not be directed to the Court, or Judge assigned to this case, but should be directed to your own attorney or class counsel:

CLINTON A. KRISLOV KRISLOV & ASSOCIATES, LTD. 222 North LaSalle Street Suite 810 Chicago, Illinois, 60601-1086 312/606-0500

Also, the court file in this case may be examined during regular business hours. The file is located at 219 South Dearborn Street, Room 2020, Chicago, Illinois. That office is open weekdays 9:00 a.m. to 4:30 p.m. Court personnel can only assist you in locating the file; they cannot answer any questions about the case.

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 6, 2000

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Nos. 99-2364, 99-2707

HOWARD R. MONTGOMERY, for himself and for all others similarly situated, for themselves and for Aetna Plywood, Inc. Profit Sharing Plan as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan,

Plaintiffs-Appellants,

v.

AETNA PLYWOOD, INCORPORATED, et al.,

Defendants-Appellees.

Appendix K

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 95 C 3193

William T. Hart,
Judge.

No. 00-1033

CLINTON A. KRISLOV and KRISLOV
& ASSOCIATES, LTD.,

Plaintiffs-Appellants,

v.

AETNA PLYWOOD, INCORPORATED, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 99 C 5531

William T. Hart,
Judge.

Appendix K

ORDER

The plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc on November 21, 2000. No judge in regular active service has requested a vote on the suggestion for rehearing en banc, and all of the judges on the panel have voted to deny the petition for rehearing. The petition is therefore DENIED.

APPENDIX L — SETTLEMENT AGREEMENT AND JOINT MOTION TO PRELIMINARILY APPROVE SETTLEMENT DATED NOVEMBER 25, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 95 C 3193
Judge William T. Hart

HOWARD R. MONTGOMERY, for himself and for all others similarly situated,

Plaintiffs,

for themselves and for AETNA PLYWOOD, INC. PROFIT SHARING PLAN, as successor to AETNA PLYWOOD, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

v.

AETNA PLYWOOD, INC., a Delaware Corporation, JEFFREY DAVIS, a trustee of Aetna Plywood, Inc. ESOP, JOHN FRANCIONE, a trustee of Aetna Plywood, Inc. ESOP, PETER JOHN, a trustee of Aetna Plywood, Inc. ESOP, and PETER THOMSEN, a trustee of Aetna Plywood, Inc. ESOP.

Defendants.

SETTLEMENT AGREEMENT AND JOINT MOTION TO PRELIMINARILY APPROVE SETTLEMENT

Appendix L

Plaintiff, Howard R. Montgomery, on behalf of himself and the class, by his attorneys Krislov & Associates Ltd.; defendant Aetna Plywood, Inc. ("Aetna"), by its attorneys D'Ancona & Pflaum, and defendant Jeffrey Davis ("Davis"), by his attorneys, Collins & Bargione, and John Francione ("Francione"), by his attorneys Smith Rickert & Smith (these three defendants are collectively referred to herein as the "settling defendants") hereby jointly move this Court for an order: (1) preliminarily approving the settlement of the Plaintiff's claims against the settling defendants, (2) setting an fairness hearing for the settlement, and (3) directing notice of the settlement and hearing be sent to the class members. In support of their motion, movants state:

1. *History of the Case.* On May 30, 1995, named plaintiff, Howard Montgomery ("Montgomery"), filed this action on behalf of himself and all others similarly situated who had been participants in the Aetna Plywood Inc. Employee, Stock Ownership Plan (the "ESOP") at the time that Aetna repurchased all Aetna shares owned by the ESOP. Defendants in the action were Aetna, Jeffrey Davis, John Francione ("Francione"), Peter John ("John"), and Peter Thomsen ("Thomsen"). Montgomery alleged that the June 12, 1992 purchase of ESOP's shares for $85.75 per share was for inadequate consideration and therefore (a) in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), defendants breached their fiduciary duties as members of the ESOP Committee and (b) in violation of Delaware Law, defendants breached their fiduciary duties as members of the Aetna Board of Directors. On April 15, 1996, the case was certified as a class action on behalf of all ESOP participants as of the date of the June 12, 1992 stock sale.

Appendix L

2. After the completion of discovery and other pretrial matters, including failed attempts to settle the case, a trial was set for January 1998. Just as the trial began, class counsel and counsel for defendants John and Thomsen entered into a proposed settlement agreement (the "First Partial Settlement").

3. The First Partial Settlement provided that John and Thomsen paid class $800,000 in exchange for dismissing all claims against them, but was to be held for submission for the court's approval after the trial concluded, to avoid affecting the outcome with respect to the three remaining Defendants (Aetna, Jeffrey Davis and John Francione.).

4. The trial proceeded on the claims against all defendants, including John and Thomsen, during January and February of 1998.

5. On June 11, 1998, the Court issued its Findings of Fact and Conclusions of Law, finding the ESOP participants were entitled to $70.00 more per share, in damages, plus prejudgment interest, costs, and attorney's fees. Aetna, Davis and Francione were found to be liable for the damages.

6. After it was disclosed that John and Thomsen had entered into a Settlement Agreement directed notice sent to the class, a full fairness hearing, and on September 3, 1998, the Court approved the first Partial Settlement. The sum has been held and invested in an interest bearing account since February 1998. This left three defendants in the case, Aetna, Davis and Francione, who would remain liable under any judgment resulting from the trial.

7. The Court entered Amended Findings of Fact and Conclusions of Law dated July 16, 1998 (the "Amended Findings"). The Amended Findings provide that the damages to be paid by Aetna, Davis and Francione total $4,272,114.60, plus accumulated prejudgment interest totaling $2,971,705.57 for a total of $7,243,820.17, plus attorneys fees yet to be determined.

8. However, no final appealable judgment has yet been entered as to Aetna, Davis, and Francione. While the parties were awaiting final judgment, class counsel was able to reach a settlement of the class claims against the remaining defendants ("This Settlement"). The parties informed the Court of their tentative agreement and asked the Court to refrain from entering final judgment, pending completion of the agreement and approval of the settlement.

9. *Settlement Terms*. The terms of the proposed settlement between the class and the Remaining Defendants are set forth below:

10. *Cash Repayment*. Within five business days after the execution of this document, Aetna shall pay six million one hundred thousand dollars ($ 6,100,000.00) in cash into the existing Aetna Litigation recovery escrow account, under class counsel's control, for eventual distribution to the profit sharing plan for the accounts of former ESOP members and payment of attorney's fees and costs, under a method to be proposed by class counsel and subject to Court approval. The $6,100,000 cash payment shall be treated as: $3,597,536.00 principal (damages) and $2,502.464.00 interest. This ratio corresponds to the principal (damages)

to interest ratio of 58.976% damages as derived from the Court's Amended Findings of Fact and Conclusions of Law ($4,272,114.60 damages and $2,971,705.57 prejudgment interest).

11. *Aetna Stock.* As additional consideration, the class members shall also receive twenty percent (20%) of the common stock of Aetna. Aetna's "S" Corporation election under federal and/or state tax laws shall be terminated. The class' Aetna stock shall be held in a ten year voting trust with class counsel, Clinton A. Krislov, serving as the trustee. At the end of the ten year period the stock will be distributed to class members in proportion to their June 1992 holdings. In the event that a successor trustee is appointed during the ten years, Mr. Krislov shall have the authority to make such an appointment, subject to reasonable approval by Aetna. Additionally, the trustee agrees not to disclose any confidential information regarding Aetna which he acquires through or as his position of voting trustee to anyone in competition with Aetna.

12. Effective October 1, 1998, Aetna has not made, and will not make, any further disbursements, salary, or remuneration of any sort to Jeffery Davis, except that: (1) Aetna may continue to provide healthcare coverage for Michiko Davis, and the Davis' children so long as they are minors or full-time students and (2) Aetna will sell the following items to Mr. Davis in exchange for the indicated payment to be made to the Company:

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Item	Serial Number	Stipulated Payment
1994 Miata		$2750.–
1996 Jeep Eagle		$7950.–
1997 Jeep Cherokee		$19338
1985 Mercedes		$12883

13. *Mr. Davis' Aetna Shares*. The Class agrees to release Mr. Jeffrey Davis without seeking to seize or discover his assets, or otherwise conduct discovery of his assets; in return for which Mr. Davis is relinquishing all ownership of shares of stock, in any form, in Aetna. Mr. Davis also shall relinquish any and all other form of control or involvement in Aetna; including any contingent reverter or security interest in any form. Any money received by Aetna or Davis for his shares of Aetna shall be the property of the class and be paid to, or for the benefit of, the class, and in no event shall be paid, in any form, to Mr. Davis.

14. The settling defendants will consult with class counsel regarding any sale or disposition of Aetna or any change in control of Aetna or its assets. Prior to final judicial approval of this settlement agreement, any such changes of ownership or control of Aetna that class counsel objects to may be submitted by Aetna for the Court's approval.

15. *Headquarters Property*. Jeffrey Davis shall also quitclaim back to Aetna his entire interest in the corporate

headquarters property (real estate in Barrington, Illinois as improved at the corporation's cost), and discharge Aetna from its lease thereon to him.

16. *Termination of Aetna's Profit Sharing Plan.* After distribution of the cash proceeds of this settlement out of the escrow to the plan trustee, Aetna's profit sharing plan will be terminated and the proceeds of each profit sharing plan participant's account will be distributed to him or her in a manner to be presented by class counsel in a manner to be approved by Class Counsel and the Court, in which participants will be able to effect a tax-free rollover of their personal Individual Retirement Account if he or she chooses to do so.

17. *Post Transaction Sale or Acquisition of Aetna.* If Aetna is sold or acquired, either in whole or in part, by sale, merger, or any other form of corporate sale, purchase, or restructuring transaction, which results from an initial contact or inquiry made within three years from the date of the final approval of this settlement, then the class shall also receive 25% of the proceeds received (irrespective of the medium of exchange) of that transaction in excess of $6,100,000.00.

18. *Attorneys Fees.* Class Counsel agrees to limit his fee request to the amount of one-third of any present or future recoveries in the case plus reimbursement of class counsel's costs and expenses not to exceed $ 500,000. All parties to this settlement agree not to oppose an attorney's fee for class counsel of that amount. Final approval of this settlement by the Court shall constitute a release of all claims asserted or

assertable in the case by class members as against the defendants Aetna, Davis, and Francione, except that the Court shall reserve jurisdiction to enforce the terms of the settlement against them, if necessary.

19. *Agreement that the Settlement is Fair.* All parties to this settlement affirm that the settlement has been entered into in good faith, after arms-length negotiations, and each party believes the settlement is a fair and just resolution of the claims being settled.

20. *Effective Dates.* The deposit obligations shall be effective on execution of this agreement. In all other respects the Agreement shall bind all parties to act in accordance with it until acted on by the Court, and shall be fully effective upon its final approval by the Court.

21. *Joint Submission.* The parties agree that this Settlement shall be submitted as to the parties joint submission to the Court for Preliminary Approval, directing of notice, and fairness hearing and final approval.

22. *Notice.* Pursuant to Federal Rule of Civil Procedure 23(3), notice of the settlement and fairness hearing must be given to the class members. Accordingly, the parties request the Court approve the notice attached as Ex-1.

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Dated: November 25, 1998

Respectfully submitted,

PLAINTIFFS CLASS COUNSEL

By: s/ Clinton A. Krislov
Clinton A. Krislov
Attorney for Plaintiff and the Class

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JOHN FRANCIONE

By: s/ Edward D. Rickert
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Attorney for John Francione

SMITH, RICKERT & SMITH
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JEFFREY DAVIS

By: s/ George B. Collins
George B. Collins, Esq.
Attorney for Jeffrey Davis

COLLINS & BARGIONE
One North LaSalle Street
Suite 2235
Chicago, IL 60602

AETNA PLYWOOD INC.

By: s/ George B. Collins

Its: President
(Officer's Title)

_____
Jeffrey Davis

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EX-1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

No. 95 C 3193
Judge William T. Hart

HOWARD R. MONTGOMERY, for himself and for all others similarly situated,

Plaintiffs,

for themselves and for AETNA PLYWOOD, INC. PROFIT SHARING PLAN, as successor to AETNA PLYWOOD, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

v.

AETNA PLYWOOD, INC., a Delaware Corporation, JEFFREY DAVIS, a trustee of Aetna Plywood, Inc. ESOP, JOHN FRANCIONE, a trustee of Aetna Plywood, Inc. ESOP, PETER JOHN, a trustee of Aetna Plywood, Inc. ESOP, and PETER THOMSEN, a trustee of Aetna Plywood, Inc. ESOP.

Defendants.

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TO: ALL PERSONS WHO WERE PARTICIPANTS OF THE AETNA PLYWOOD, INC. EMPLOYEE STOCK OWNERSHIP PLAN ON JUNE 12, 1992 (OR THEIR SURVIVING BENEFICIARIES)

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION
NOTICE OF REQUEST FOR ATTORNEY'S FEES
NOTICE OF HEARING AS TO SETTLEMENT AND ATTORNEY'S FEES.

This notice is provided to inform all class members of (1) a proposed settlement of this litigation with the three remaining defendants; (2) Class Counsel's request for attorney's fees; and (3) methods of commenting on the settlement and fee request, including a hearing to be held on _____.

Please read this notice carefully and in full. If you receive this notice, you should be a person who was a participant in the Aetna Plywood, Inc. Employee Stock Ownership Plan at the time all its stock was sold back to the company on June 12, 1992 (or you are a surviving beneficiary of such a participant). If you have any question about whether you are a member of the class, contact class counsel at the telephone number or address listed below.

NOTICE IS HEREBY GIVEN that a **SETTLEMENT HEARING** will be held before Judge William T. Hart in **Room 2243** of the **Dirksen Federal Building, 219 S. Dearborn Street, Chicago, Illinois 60604** at

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_____ on _____, 199__. At the Settlement Hearing the court will (1) consider whether settlement of the class claims against the remaining defendants, Aetna Plywood, Inc. ("Aetna"), Jeffrey Davis ("Davis"), and John Francione ("Francione") is fair, reasonable, adequate, and in the best interests of the class; (2) hear any comments regarding approval of the settlement; and (3) hear any comments regarding class counsel's request for attorney's fees.

I. Background

On May 30, 1995, named plaintiff, Howard Montgomery ("Montgomery"), filed this action on behalf of himself and all others who had been participants in the Aetna Plywood Inc. Employee Stock Ownership Plan (the "ESOP") at the time that Aetna repurchased all of the Aetna shares owned by the ESOP. Defendants in the action were Aetna, Jeffrey Davis, John Francione ("Francione"), Peter John ("John"), and Peter Thomsen ("Thomsen"). Montgomery's complaint alleged that the June 12, 1992 sale of the ESOP's Aetna shares for $85.75 per share was for inadequate consideration for the shares and therefore (a) breached the defendants' fiduciary duties as trustees under the federal Employee Retirement Income Security Act of 1974 ("ERISA") and also (b) violated Delaware Law applicable to them as directors of Aetna for breaching their duties owed to the ESOP as the holder of 95% of Aetna's shares. On April 15, 1996, the case was certified as a class action on behalf of all ESOP participants as of the date of the June 12, 1992 stock sale.

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After the completion of discovery and other pretrial matter, including failed attempts to settle the case, a trial was set for January 1998. Just as the trial began, class counsel and counsel for defendants John and Thomsen entered into a proposed settlement agreement (the "First Partial Settlement").

The First Partial Settlement provided that John and Thomsen paid class $800,000 in exchange for dismissing all claims against them, but was to be held for submission for the court's approval after the trial concluded, to avoid affecting the outcome with respect to the three remaining Defendants (Aetna, Jeffrey Davis and John Francione.).

III. Outcome of the Trial.

A trial as to the claims against all defendants, including John and Thomsen, was held in January and February of 1998. On June 11, 1998, the Court issued its Findings of Fact and Conclusions of Law, finding the ESOP was entitled to $70.00 more per share as damages plus prejudgment interest, costs, and attorney's fees. Aetna, Davis and Francione were found to be liable for the damages.

After it was disclosed that John and Thomsen had entered into a Settlement Agreement, the Court entered Amended Findings of Fact and Conclusions of Law dated July 16, 1998 (the "Amended Findings"). The Amended Findings provide that the damages to be paid by Aetna, Davis and Francione total $4,272,114.60 plus accumulated prejudgment interest totaling $2,971,705.57, for a total of $7,243,820.17

However, the court withheld entering its final judgment order and encouraging the parties to resolve the matter by settlement. Negotiations ensued and class counsel was able to reach a settlement of the class claims against the remaining defendants (the "Settlement"). The parties informed the Court of their tentative agreement and asked the Court to refrain from entering final judgment, pending completion of the agreement and approval of the settlement. The terms of the proposed settlement are set forth below:

IV. Terms of the Proposed Partial Settlement.

Cash. Prior to the preliminary approval, Aetna paid six million one hundred thousand dollars ($ 6,100,000.00) in cash into the existing Aetna Litigation recovery escrow account, under class counsel's control, for eventual distribution to the profit sharing plan for the accounts of former ESOP members and payment of attorney's fees and costs, under a method to be proposed by class counsel and subject to Court approval.

Stock. As additional consideration, the class shall also receive twenty percent (20%) of the common stock of Aetna Plywood Inc.. The class' Aetna stock shall be held in a ten year voting trust with class counsel, Clinton A. Krislov, serving as the trustee. At the end of the ten year period the stock will be distributed to class members in proportion to their June 1992 holdings.

Jeffery Davis. Mr. Davis shall cease to receive any benefits, salary, or other remuneration from Aetna and shall cease to be involved, in any way, in the ownership or operation of Aetna.

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Sale of the Company. If Aetna is sold or acquired, either in whole or in part, by sale, merger, or any other form of corporate sale, purchase, or restructuring transaction, which results from an initial contact or inquiry made within three years from the date of the final approval of this settlement, then the class shall also receive 25% of any amount by which the proceeds received (irrespective of the medium of exchange) in that transaction exceed $6,100,000.00.

Termination of Aetna's Profit Sharing Plan. After distribution of the cash proceeds of this settlement out of the escrow to the plan trustee, Aetna's present profit sharing plan will be terminated and the proceeds of each profit sharing plan participant's account will be distributed to him or her in a manner to be presented by class counsel and approved by the Court. If possible, the method of distribution will afford each participant the opportunity to effect a tax-free rollover of their personal Individual Retirement Account if he or she chooses.

Your Share of the Recovery. The amount of your share of the recovery will be determined by the ratio of your ESOP share ownership (determined as of the July 1992 sale date) relative to the total shares held by all class members. Based upon a $ 6.9 million recovery which may be increased by interest and reduced by the requested attorneys fees, costs, expenses, and an incentive award to the named plaintiff, the gross recovery would be approximately $95.23 per share based on the 72,458 shares held by the class members. If the maximum requested fees, awards, and reimbursements requested by class counsel are awarded by the court, then the net recovery will be approximately $56.58 per share.

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V. Class Counsel's Recommendation as to Approval of the Settlement

Class counsel recommends acceptance of the Settlement Agreement as fair and reasonable for the following reasons:

(1) The settlement recovers a substantial percentage of the defendants' liability resulting from the trial. Specifically the settlement provides for immediate payment of $6.1 million plus 20% ownership of Aetna. Added to the $800,000 already received in the Partial Settlement with Messrs. John and Thomsen, the total recovery of $6.9 million plus stock, compares favorably and may even ultimately exceed the just over $8 million plus attorney's fees and costs that would be achieved by the entry of a final judgment order combined with the Partial Settlement.

(2) The settlement eliminates substantial risks adverse to the class if they had not reached the settlement. These risks include an adverse decision from the appellate court, substantial delay in collecting the judgment, and the possibility that the defendants would not be able to pay all or even a substantial portion of the judgment. By agreeing to the terms of this settlement, the class allows Aetna to continue operating as a viable and profitable entity, which in turn, gives it the ability to pay the settlement.

(3) Even if the class were able to ultimately collect the entire judgment amount, it would almost certainly be delayed for a year or more if the defendants chose to appeal the case.

(4) The Settlement also preserves Aetna's business future and the corresponding employment security for class

members who are still Aetna employees, along with a significant 20% equity participation in the company's future success plus the opportunity to participate in profits if a near term sale of the company occurs.

VI. Settlement Hearing and Opportunity for Comment

The purpose of the Settlement Hearing will be to determine whether the Settlement Agreement is fair, reasonable, adequate, and in the best interests of class members, and whether a judgment should be entered approving the Settlement Agreement and dismissing the claims against the remaining defendants.

Any class member may comment on the Settlement Agreement in writing by submitting a copy of any written comments to class counsel, counsel for Aetna, counsel for Davis, and counsel for Francione. Comments may be either in support of or against approving the Settlement. Class counsel will be responsible for filing a copy of your comments with the Court. Any comments must be served or postmarked by no later than _____.

Any class member may present oral comments by appearing in person at the Fairness Hearing to be held _____ at _____ at **219 S. Dearborn Street, Room 2243, Chicago, Illinois 60604**. Oral comments may be presented regardless of whether comments were filed. The Court reserves the right to limit the time for oral comments.

Written or oral comments may be presented either personally or through counsel of the class member's choosing.

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VII. Class Counsel's Request for Fees

Class counsel has requested that he be awarded attorney fees in the amount of one-third of the Class's actual recovery of damages, prejudgment interest, and the settlement payment, plus out of pocket expenses. Taking into account the $6,100,000 fund to be created by the proposed settlement and the $800,000 from the First Partial Settlement, class counsel seeks $ 2,300,000 in fees plus out of pocket expenses not to exceed $500,000.

At this time class counsel seeks a fee award based only on a percentage of the cash component of the settlement. Class counsel defers seeking any fee at this time on either immediate stock paid to the class (20% of the settlement) or the potential future cash recovery in the event the company is sold, but will request the Court's ruling on any additional fee based on these parts of the settlement at such time as the shares or proceeds from sale of the company, may produce or be converted to cash.

The settling defendants believe that class counsel's request for fees of up to one-third of the recovery plus out of pocket expenses up to $500,000 is fair and reasonable. They have agreed not to oppose or recommend opposing the requested fees, provided they do not exceed these limits.

Class counsel has already filed his motion for attorney's fees. That motion and its supporting brief may be examined by requesting a copy from class counsel or by examining the original on file with the Clerk of the Court. The Court may not rule on the motion until after the _____ Settlement Hearing.

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Any written comments regarding class counsel's motion for attorney's fees and out of pocket expenses must be mailed or served by _____. Oral comments regarding class counsel's motion for attorney fees and out of pocket expenses may be presented at the Settlement Hearing to be held _____, at _____ at **219 S. Dearborn Street, Room 2243, Chicago, Illinois 60604**. Comments may support or oppose class counsel's motion and may be presented in person or through an attorney of the class member's choosing.

VIII. Counsel

Class Counsel

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IX. Examination of Papers and Inquiries

This Notice contains only a summary of the history of this litigation. For more detailed information, you may examine the complaint, orders, and other pleadings in the litigation. These papers may be inspected at the office of the Clerk of the Court, Northern District of Illinois, 219 S. Dearborn Street, Room 2020, Chicago, Illinois 60604 during regular business hours.

DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE WITH YOUR QUESTIONS. ALL QUESTIONS RELATING TO THE PROPOSED SETTLEMENT SHOULD BE DIRECTED TO CLASS COUNSEL

BY ORDER OF:

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS